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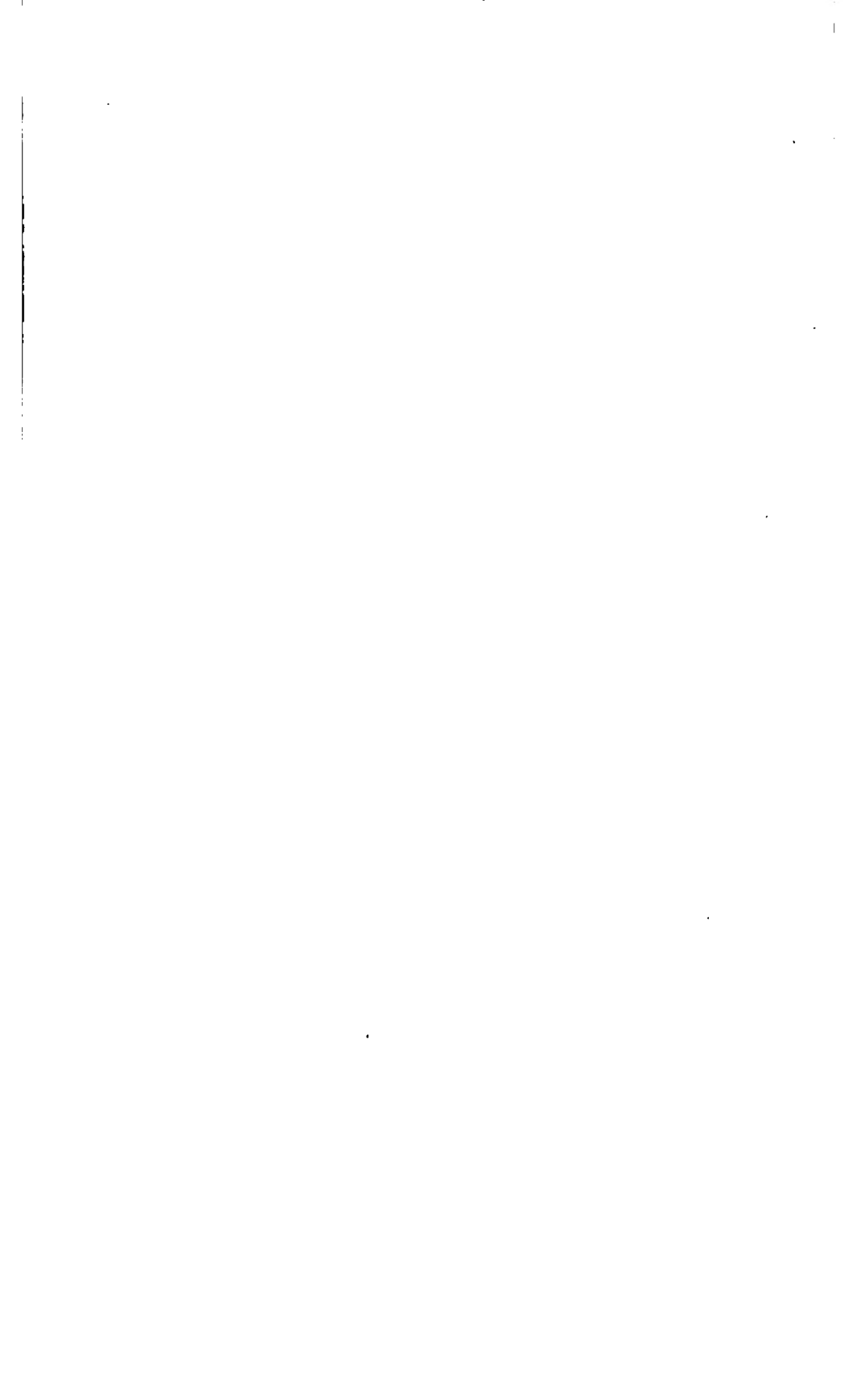
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXX.

CONTAINING

CASES IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM AND
VACATION, 1850, AND HILARY AND EASTER TERMS, 1851.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

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1853.

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BY

JOHN SCOTT, ESQ.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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JUDGES

OF


THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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The Right Hon. Sir JOHN JERVIS, Knt., Ld. Ch. J.
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A

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Sir JOHN JERVIS, Knight, Her Majesty's Attorney-General, was appointed Lord Chief Justice of the Court of Common Pleas, in the

room of Lord TRUBO, and was sworn of Her Majesty's Privy Council. On being called to the degree of the Coif, he gave rings with the motto "*Venale nec auro.*" His Lordship took the oaths, and his seat in the Court of Common Pleas, on the first day of this term.

Sir *John Romilly*, Knt., Her Majesty's Solicitor-General, succeeded to the office of Attorney-General; and *Alexander James Edmund Cockburn*, Esq., Q. C., was appointed Her Majesty's Solicitor-General, and was thereupon knighted.

In August last, Sir LANCELOT SHADWELL, Vice-Chancellor of England, died; and Vice-Chancellor Sir JAMES WIGRAM resigned his office.

Shortly before this term, Mr. Baron ROLFE was appointed Vice-Chancellor, and sworn of Her Majesty's Privy Council: and in the December following, he was created a peer, by the title of Baron CRANWORTH, of Cranworth, in the county of Norfolk.

In the course of this term, SAMUEL MARTIN, of the Inner Temple, Esq., Q. C., was appointed a Baron of the Court of Exchequer, in the room of Mr. Baron ROLFE, having previously been called to the degree of the Coif, on which occasion he gave rings with the motto "*Labore.*" Shortly afterwards he received the honour of knighthood.

In the course of the term, Mr. Serjt. *Allen* and Mr. Serjt. *Wilkins*, respectively, received patents of precedence.

Robert Miller, of the Middle Temple, Esq., was called to the degree of the Coif, and gave rings with the motto "*Honestè niti.*"

*3] *SARAH WATSON, Demandant; JOHN WATSON, Tenant.
Nov. 5.

To a count in dower under the statute of Merton, the tenant pleaded *tout temps prié*: the demandant replied a demand and refusal to render dower, before the suing out of the writ, to which the tenant rejoined by a traverse of the demand. The issue having been found for the demandant,—Held, that she was entitled to damages, to be computed from the decease of her husband.

Semble, that a demand of dower need not be made by the widow personally, or in the presence of witnesses.

DOWER, under the statute of Merton (20 H. 3, c. 1). The demandant in her count claimed dower of one-third of certain hereditaments, with the appurtenances, of the endowment of John Watson, theretofore her husband, whereof she had nothing, &c.

Plea,—that, from the death of the said John, late husband of the said Sarah Watson, the tenant has always been, and still is, ready to render to the said Sarah Watson her dower of the said hereditaments, with the appurtenances, and rendereth the same here in court to the said Sarah Watson.

Replication,—that the demandant ought not to be barred from having her aforesaid dower from the time of the death of the said John Watson,

heretofore her husband, because her said husband died seised in his demesne as of fee, and that she, after his death, and before suing out the original writ, to wit, on the 9th of September, in the thirteenth year of the reign of Victoria, at, &c., required the said John Watson, the tenant, to render her, the said Sarah, her reasonable dower aforesaid: verification: therefore she prays judgment and her seisin of the third part of the said hereditaments, with the appurtenances, together with her damages on occasion of the detention of the same, from the time of the death of the said John Watson, heretofore her husband, to be adjudged to her.

Rejoinder—that the said Sarah Watson did not require him, the said tenant, to render to her, the said Sarah Watson, her reasonable dower aforesaid, in manner and form, &c. Issue thereon.

*The cause was tried before CRESSWELL, J., at the last assizes at Carlisle. The facts were these:—John Watson, the husband of [*4 the demandant, died on the 17th of November, 1843. For three or four years after his death, the tenant, his heir-at-law, had paid his widow (the demandant) a yearly sum in lieu of dower, but refused to pay any more. The annual value of the dower was 23*l.* 6*s.* 8*d.* The only demand and refusal proved, was, that, on the 9th of October, 1849, Isaac Watson, a brother of the tenant, “asked him if he would pay his mother her thirds,” to which he answered “No.”

On the part of the tenant, it was insisted that there was no legal evidence of a demand of dower, and therefore that the demandant could only be entitled from the commencement of the action; but, ultimately, it was agreed that the demand should stand as a valid demand for one year's dower.

For the demandant, it was insisted that the payment of the dower for three or four years, was of itself some evidence of a demand.

The learned judge was of that opinion; and he directed the jury to find a verdict for the demandant for 116*l.* 13*s.* 4*d.*, (a) being the value of her dower, computed from the time of her husband's death,—reserving leave to the tenant to move to reduce the damages to 23*l.* 6*s.* 8*d.*, one year's dower, if the court should be of opinion that the demandant could only recover damages from the time of the actual demand, viz. the 9th of October, 1849.

S. Temple, accordingly, now moved to reduce the damages to 23*l.* 6*s.* 8*d.* The widow was not entitled to recover damages for the detention of her dower, unless and until she had made a formal demand upon the tenant to assign her dower by metes and bounds. *In Co. Litt. 32 b, it is said: “Some say that the demandant in a writ of dower, [*5 that delayeth herself, shall not recover damages: therefore, let the demandant take heed thereof. It is necessary for the wife, after the decease of her husband, as soon as she can, to demand her dower be-

(a) Deducting, it is presumed, the yearly sums paid.

fore good testimony; for otherwise she may, by her own default, lose the value after the decease of her husband, and her damages for detaining of her dower." So, in Bacon's Abridgment, title *Dower*, (M.), (a) it is laid down that "Damages must be after demand of dower; for, the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which cannot divide without the concurrence of the wife: but a demand *in pais*, before good testimony, is sufficient." [WILLIAMS, J.—The issue joined, is, whether there was a request or not.] It is, whether or not there was a request on a particular day. The allegation of demand is a material allegation. [WILLIAMS, J.—You move to reduce the damages: and you have a plea upon the record of *tout temps prist*; with a replication of a demand of dower, upon which issue is taken. If it was proved, that, at any time before action, a demand of dower was made, your plea is falsified,—you were *not* always ready.] That argument was urged at the trial. But it is submitted that the plea is distributive. Besides, the demand was clearly no legal demand, such as the authorities above cited show it must be.

MAULE, J.—The authorities referred to show how the demand may properly be made: but there is nothing to show that a valid demand may not be made otherwise; and there seems to have been no question raised here as to the authority of Isaac Watson to make the demand on behalf of his mother.

*6] *JERVIS, C. J.—The simple question is, whether or not there was evidence to go to the jury of a demand. I think there was, and consequently, that there should be no rule.

The rest of the court concurring,

Rule refused.

(a) Citing Co. Litt. 32 a.

An omission by the widow to demand her dower will not prejudice her claim to damages; and the tenant, to excuse himself from damages, must plead *tout temps prist*. *Hitchcock v. Harrington*, 6 Johns. 290. To such plea the demandant ought not to demur, but should pray judgment according to the tender: and the value may afterwards be ascertained by the sheriff on a writ of seisin, or by writ of inquiry founded on her suggestion. *Humphrey v. Phinney*, 2 Johns. 484. Damages are recoverable from the time of a demand of dower on the then tenant of the freehold, and not from the time of a demand on one who was tenant at the death of the husband but not at the time of the demand. *Leavitt v. Lamprey*, 13 Pick. 382. If the heir sell the land, the widow will be entitled to damages against the tenant from the time of her husband's death, although the tenant may not have been so long in possession. *Hitchcock v. Harrington*, 6 Johns. 290; *Seaton v. Jamison*, 7 Watts, 533. *Contrà*—The widow is entitled to damages, as against a purchaser of the hus-

band's title after his death, only from the date of the purchase, and not from the death of the husband. *Green v. Tennant*, 2 Harrington, 336.

At law the widow cannot recover damages as *meane profits* against a purchaser, but from the institution of the suit, though the rule is otherwise as against the heir. *Beavers v. Smith*, 11 Alabama, 20. A widow is entitled to damages, not as of any particular period, but as of the value of property at different periods in which she is deprived of dower; in case of the heir, from the death of the husband; in the case of the alienee, from the time of her demand until the assignment of dower. *M'Clanahan v. Porter*, 10 Missouri, 746.

Damages for detention of dower were not recoverable at common law: they were given by the statute of Merton from the death of the husband as against the heir; but as against the alienee of the husband, damages are recoverable only from the time of demand and refusal. *Layton v. Butler*, 4 Harrington, 507. In an

action to recover dower, in New Jersey, the heir or devisee of the husband, if he died seised, may plead *tout temps* priet, and he need not aver in the plea that he is heir or devisee. Hopper v. Hopper, 1 New Jersey, 543.

SMITH and COLES v. LOVELL. Nov. 25.

In assumpsit, the first count stated, that A. and B. were tenants of certain chambers to one C. at a certain rent, payable quarterly; and that, in consideration that A. and B. would underlet the chambers to D. at a certain rent, payable quarterly, D. promised A. and B. that he would pay the *said* rent to C., and that, if he should not do so, he would indemnify A. and B. in respect thereof, and pay the same to them: and the breach assigned was, non-payment by D. of the rent due from A. and B. to C.:—Held, that, whether the declaration meant to allege the contract to have been, that D. should pay C. the rent due from A. and B. to C. or the rent due from D. to A. and B. under the demise which was the consideration for his promise, it was not to be taken as alleging that D.'s promise to pay C. was to extend further than his liability to pay rent under his own tenancy to A. and B.

D. pleaded,—sixthly,—a surrender (*called* a surrender A.) by act and operation of law, by his delivering up the possession of the chambers to A., and A. accepting possession thereof, with the intention of putting an end to the tenancy; averring that A., in so accepting the possession, acted for and on behalf of himself and B., with B.'s authority. To this plea, A. and B. replied, that D. of his own wrong quitted possession of the chambers,—because they said that it was agreed between them, in consideration that D. would become tenant of the said chambers to A. and B., and indemnify them in respect of the rent, as in the first count mentioned, that, in case A. and B. should give notice to D. to terminate that agreement, and D. should be desirous of continuing his occupation of the premises as tenant to C., A. and B. should not occupy them, or interfere to prevent any arrangement which D. might be desirous of making for continuing his occupation of the premises under C.; that A. and B. were and continued ready and willing to suffer D. to continue such occupation under C., and did not interfere to prevent D. from entering into any arrangement with C. as therein mentioned; that A. and B. received the keys of the chambers from D., and took possession thereof, to the intent that they might let them for the benefit of D.; and that they refused to receive the keys, except on the terms that D. should not be released from his liability in respect of the agreement in the first count mentioned,—*absque hoc*, that all the estate, &c., and tenancy of D. in the chambers, were duly surrendered by act and operation of law, in manner and form, &c.:—Held, *bad*, on special demurrer, on the ground that the inducement was inconsistent and incongruous with the traverse.

The seventh plea stated, that, before the rent became due from A. and B. to C., it had been agreed between A., for and on behalf of himself and B., and with his authority, and D., that D. should deliver up the possession of the chambers to A., and that, in consideration thereof, D. should be discharged from further liability for rent; and that D. did accordingly deliver up possession to A., which he on behalf of himself and B. accepted:—Held, that this plea set up a good defence by way of executed contract.

To that plea A. and B. replied, traversing that it was agreed by and between A., for and on behalf of himself and B., and D., that D. should be discharged from liability to pay any further rent, and that possession was accepted, in pursuance of the alleged agreement, in discharge of D.'s liability, in manner and form, &c.:—Held, that the traverse was too large.

Quære, whether the replication was not also bad for duplicity and multifariousness?

The eighth plea alleged, that, before the rent became due from A. and B. to C., A., with the sanction and authority of B., evicted D. Replication, traversing that A. evicted D., with the sanction and authority of B.:—Held, *bad*, the traverse being too large.

The eleventh plea, to the second and third counts (the former being for use and occupation, the latter upon an account stated), averred, that, after the accruing of the causes of action, and before action brought, D. was discharged under the insolvent debtors' act. Replication, that the causes of action accrued after the order and adjudication in the plea mentioned:—Held, *bad*, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the accruing of the causes of action.

THIS was an action of assumpsit. The first count of the declaration stated, that theretofore, to wit, on the 4th December, 1846, the plaintiffs

*7] were tenants *of certain chambers, to one William James Heale, clerk, and were liable to the payment of a certain rent, to wit, the rent of 84*l.* a year, payable quarterly, in respect thereof, and so continued from that day until the 25th of March, 1849; that, theretofore, to wit, on the 5th of December, 1846, in consideration that the plaintiffs, at the request of the defendant, would demise and underlet to the defendant the said chambers, with the appurtenances, to hold the same to the defendant as tenant thereof to the plaintiffs from Christmas Day then next, at and under a certain rent, to wit, the rent of 84*l.* per annum, payable quarterly, to wit, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December, in each and every year, he, the defendant, then promised the plaintiffs that he would pay *8] the said rent to the said W. J. Heale, and *that, if he, the defendant, should not pay the said rent to the said W. J. Heale, he, the defendant, would indemnify and save the plaintiffs harmless in respect thereof, and pay the same to the plaintiffs; that they, the plaintiffs, did accordingly, to wit, on the said 5th of December, 1846, let the said chambers to the defendant on the terms aforesaid, and, under and by virtue of the said demise, the defendant held and enjoyed the said chambers, with the appurtenances, as tenants thereof to the plaintiffs, for a long time, to wit, from Michaelmas, in the year last aforesaid, until and upon the 25th of March, 1849; that, on the 29th of September, 1847, and on divers other days and times between that day and the commencement of this suit, divers sums of money, amounting in the whole to a large sum of money, to wit, to the sum of 126*l.*, parcel of the rent aforesaid, became and was due and payable from the plaintiffs to the said W. J. Heale; that the defendant, although thereunto requested by the plaintiffs so to do, on the 25th of March, 1848, and on divers other days and times between that day and the commencement of this suit, did not pay the said several sums of money, or any part thereof, to the said W. J. Heale; that, on the 21st of July, 1848, and on divers other days and times between that day and the commencement of this suit, the plaintiffs paid to the said W. J. Heale divers large sums of money, to wit, divers sums of money, amounting in the whole to the said sum of 126*l.*; and that, on the said 21st of July, 1848, and on divers other days and times between that day and the commencement of this suit, the defendant was requested by the plaintiffs to pay them the said several sums of money respectively; yet that the defendant, disregarding his promises, had not paid the said several sums of money respectively, or any part thereof.

The declaration also contained a count for use and occupation, and a count upon an account stated.

*9] *The defendant pleaded, amongst other pleas, sixthly,—as to so much of the first count as related to the sum of 84*l.*, part and parcel of the said sum of 126*l.* of the rent in the said first count mentioned,

and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale,—that, after the making of the said agreement in the said first count mentioned, and before any part of the said sum of 84*l.* of the rent in the said first count mentioned, accrued or became payable from the plaintiffs to the said W. J. Heale, and whilst the defendant held and enjoyed the said chambers, with the appurtenances, as tenant thereof to the plaintiffs, as in the said first count mentioned, and before the 24th of June, 1848, and before the commencement of this suit, to wit, on the 12th of June, 1848, all the estate, term, and interest, and the tenancy of the defendant in the said chambers, with the appurtenances, were duly surrendered by the defendant to the plaintiffs by act and operation of law, that is to say, by the defendant's then quitting possession of the said chambers, with the appurtenances, by the consent of the plaintiff H. T. Coles, and by the defendant's then delivering up the keys of the outer and other doors of the said chambers to the plaintiff H. T. Coles, and by the defendant's then relinquishing and giving up the possession and enjoyment of the said chambers to the plaintiff H. T. Coles, with the intention of putting an end to the said tenancy in the said first count mentioned, and by the plaintiff H. T. Coles's then accepting the said keys of the outer and other doors of the said chambers, and such possession and enjoyment of the said chambers, with the appurtenances, with the intention of putting an end to the said tenancy in the said first count mentioned; that he, the defendant, has not from thenceforward held or enjoyed, or had any further use or occupation of the said chambers, or any part thereof; *and that the plaintiff H. T. Coles, in giving such license, and in accepting the said keys and such possession of the said chambers, acted for and on behalf of himself and the said other plaintiff, C. Smith, with the authority of the plaintiff C. Smith; and that the plaintiff H. T. Coles, from thence until and upon the said 25th of March, 1849, had been in the actual possession, occupation, use, and enjoyment, with the assent of the plaintiff C. Smith, of the said chambers, with the appurtenances: verification.

Replication to the sixth plea,—that the defendant of his own wrong quitted the possession and occupation of the said chambers, with the appurtenances, because the plaintiffs said, that, on a certain day, to wit, on the 5th of December, 1846, it was agreed between the plaintiffs and the defendants, in consideration that the defendant would become tenant of the said chambers to the plaintiffs, and indemnify and save them harmless in respect of the rent thereof, in manner and form as in the first count of the declaration mentioned, that, in case the plaintiffs should give notice to the defendant to terminate that agreement, and the defendant should be desirous of continuing his occupation of the premises as tenant to the said W. J. Heale or his assigns, then and in such case that the plaintiffs should not, either jointly or severally, occupy the said premises, or interfere to prevent any arrangement which the defendant

might be desirous of making for continuing his occupation of the said premises under the said W. J. Heale or his assigns; that the plaintiffs had been always ready and willing, and still were ready and willing, to permit and suffer the defendant to continue the occupation of the said chambers under the said W. J. Heale, and that they did not interfere to prevent the defendant from entering into any arrangement with the *11] said W. J. Heale as therein mentioned; that *afterwards, to wit, on the 24th of March, 1848, the plaintiffs received the keys of the outer and other doors of the said chambers from the defendant, and afterwards took possession thereof, at the request of the defendant, to the intent that they might be able to let the said chambers for the benefit of the defendant, and that they refused to receive the keys of the outer and other doors of the said chambers from the defendant, except on the terms that the defendant should not be released from his liability in respect thereof, and that the keys of the outer and other doors of the said chambers, and the possession of the said chambers, were received by the plaintiffs from the defendant on no other terms or conditions than on the terms that the defendant should not be released from his liability under the agreement in the first count of the declaration mentioned or referred to;—without this, that all the estate, term, and interest, and the tenancy of the defendant in the said chambers, with the appurtenances, were duly surrendered by act and operation of law, in manner and form as in that plea alleged.

Special demurrer, assigning for cause (amongst others) that the inducement was inconsistent and incongruous with the traverse:

Seventh plea,—as to so much of the said first count of the declaration as relates to the sum of 84*l.*, parcel of the said sum of 126*l.* of the rent in the said first count mentioned, and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale,—that, before the said sum of 84*l.*, parcel of the said rent in the first count mentioned, accrued or became due from the plaintiffs to the said W. J. Heale, and before the 24th of June, 1848, to wit, on the 12th of June, 1848, it was agreed by and between the plaintiff H. T. Coles, for and on behalf of himself and the said other plaintiff, C. Smith, and with his authority, *12] that *the defendant should quit and deliver up to the plaintiff, H. T. Coles, and that the plaintiff, H. T. Coles, for and on behalf of himself and the said other plaintiff C. Smith, should take possession of the said chambers, with the appurtenances, before the said 24th of June, 1848, to wit, on the 12th of June, 1848, and that, in consideration thereof, the defendant should be discharged from all liability to pay any further rent or other compensation which would otherwise become due for the holding, occupying, or enjoying the said chambers, with the appurtenances; that, in pursuance of the said agreement, he, the defendant, afterwards, to wit, on the said 12th of June, 1848, being before the said 24th of June, 1848, and before the commencement of this suit, did

quit and deliver up possession of the said chambers, with the appurtenances, to the plaintiff H. T. Coles, and the plaintiff H. T. Coles, for and on behalf of himself and the said other plaintiff, C. Smith, and with his authority, then accepted such possession, in pursuance and on the terms of the agreement in this plea mentioned, and in discharge of the liability of the defendant to pay any more or further rent or compensation for the said chambers, with the appurtenances; and that the plaintiff H. T. Coles, then, with the authority of the said other plaintiff, C. Smith, then entered into and upon the said chambers, with the appurtenances, and thenceforth continually had remained and was in possession thereof, and the defendant had not, since he so quitted and gave up possession of the same, held, used, or enjoyed the same; verification.

Replication,—that it was not agreed by and between the plaintiff H. T. Coles, for and on behalf of himself and the plaintiff C. Smith, and the defendant, that the defendant should be discharged from all liability to pay any further rent or other compensation which should become due in respect of the said chambers, with the *appurtenances, nor was [*18 possession accepted of the said chambers, with the appurtenances, in pursuance of the alleged agreement in that plea mentioned, in discharge of the defendant's liability to pay any more rent or compensation for the said chambers, with the appurtenances, in manner and form as in that plea alleged; concluding to the country.

Special demurrer, assigning for cause (amongst others) that it was double and multifarious, inasmuch as the plaintiffs had denied not only the agreement alleged, but also the acceptance of the possession of the chambers in pursuance thereof.

Eighth plea,—as to the sum of 84*l.*, parcel of the said sum of 126*l.* of the rent in the said first count mentioned, and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale,—that, after the making of the said agreement in the said first count mentioned, and before any part of the said sum of 84*l.*, parcel of the said rent in the said first count, became due and payable from the plaintiffs to the said W. J. Heale, and before the 24th of June, 1848, and before the commencement of this suit, to wit, on the 12th of June, 1848, the plaintiff H. T. Coles, with the sanction and authority of the other plaintiff, C. Smith, with force and arms, &c., and against the will and consent of the defendant, wrongfully entered into and upon the said demised premises with the appurtenances, and then ejected and expelled, put out and amoved the defendant from the possession, use and occupation, and enjoyment thereof, and kept and continued the defendant so ejected, expelled, put out, and amoved from thence hitherto; and that the defendant had not at any time since such entry and eviction had any use, possession, occupation, or enjoyment thereof, or derived any benefit therefrom; verification.

*14] Replication,—That the plaintiff H. T. Coles did not *eject, expel, put out, and amove the defendant from the possession, use, occupation, and enjoyment of the said chambers, with the appurtenances, with the sanction and authority of the plaintiff C. Smith, in manner and form as in the plea alleged; concluding to the country.

Special demurrer, assigning the same causes as in the demurrer to the replication to the seventh plea.

Eleventh plea,—as to the second and third counts of the declaration,—that, after the making of the promises in the said second and third counts of the declaration mentioned, and before the commencement of this suit, to wit, on the 18th of June, 1848, by a certain order and adjudication then made by the court for the relief of insolvent debtors in England, held at the court-house in Portugal Street, in the county of Middlesex, he, the defendant, was duly discharged according to a certain act of parliament made and passed in a session of parliament held in the first and second years of the reign of Her Majesty Queen Victoria,—being “An act for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedy of creditors against property of debtors, and for amending the laws for the relief of insolvent debtors in England,”—of and from the said several causes of action in the said second and third counts of the said declaration mentioned, and each of them; and that the said order remained in force, &c. : verification.

Replication,—to so much of the eleventh plea of the defendant pleaded to the second and third counts of the declaration, as related to the third count of the declaration,—that the cause of action in the third count mentioned, accrued to the plaintiffs after the 18th of June, 1848, and after the making of the order and adjudication in that plea mentioned; verification.

Special demurrer, for that the replication amounted merely to an *15] argumentative denial of the allegation *in the plea, that the order and adjudication were made after the accruing of the causes of action.

Willes, in support of the demurrers.—The replications are clearly bad. The declaration states that the plaintiffs were tenants of certain chambers to one Heale, and were liable to a certain rent in respect thereof, and that, in consideration that they would underlet them to the defendant, the defendant promised that he would pay the rent to Heale, or indemnify the plaintiffs in respect of such rent, and pay the same to them; and the breach assigned, is, non-payment of the rent to Heale. The sixth plea states a surrender by act and operation of law, (a) in a manner which has on numerous occasions been held good: *Morrison v. Chadwick*, 7 Com. B. 266 (E. C. L. R. vol. 62). And the replication

(a) *Quare*, whether an act done expressly caused *sursumreddendi* can be properly treated as a surrender by operation of law?

amounts to a mere argumentative denial of that statement. [WILLIAMS, J.—The replication is clearly bad: it might have been otherwise, if the plea had merely alleged a surrender by act and operation of law, without showing the circumstances. JERVIS, C. J.—This plea is very like the plea which was held bad in *Morrison v. Chadwick*.] That was on special demurrer: here, it is pleaded over to. [WILLIAMS, J.—I do not think *Morrison v. Chadwick* has much bearing on this point.]

The seventh plea is founded upon the case of *Gore v. Wright*, 8 Ad. & E. 118 (E. C. L. R. vol. 35), 3 N. & P. 234. There, to debt for 63*l.*, rent, for two years and one quarter, due on the 25th of March, 1837, reserved on a demise for forty-five years, at 28*l.* per annum,—the defendant pleaded, that, before any of the sum claimed became due, and more than two years and a quarter before the 25th of March, 1837, and before the 25th of December, 1834, viz. on the 17th of *April, 1834, the plaintiff [*16 and defendant agreed that the defendant should give up, and the plaintiff take, possession of the premises before the 25th of December, 1834, and that, in consideration thereof, the defendant should be discharged from the rent which would have become due for the occupation after the 25th of December, 1834; that possession was given up by the defendant and accepted by the plaintiff accordingly; that the plaintiff entered on the 17th of April, 1834, and had held ever since, and the defendant had not held since; and that “the said tenancy, and the defendant’s said interest were thereby then surrendered and extinguished: and it was held, that, on this plea, the objection did not arise, whether the term was shown upon the record to be regularly surrendered according to the statute of frauds, 29 Car. 2, c. 3, s. 3; the defence being merely an executed contract, that, in consideration of the defendant’s giving up possession, the plaintiff should abandon his claim to the rent; and that such defence was valid. The replication puts in issue the fact of the agreement’s having been made by Coles with the authority of Smith, which was wholly immaterial; *Wallace v. Kelsall*, 7 M. & W. 264,† 8 Dowl. P. C. 841, 1 H. & W. 25: and, besides, it puts in issue not the agreement only, but also the performance of it.

The eighth plea states an eviction by Coles, with the sanction and authority of Smith: and the replication is open to the same objection as the replication to the seventh plea.

The eleventh plea sets up the discharge of the defendant under the insolvent debtors’ act, on the 18th of June, 1848: and the replication is, that the cause of action to which that plea addresses itself, accrued to the plaintiffs after that day. The replication is clearly bad: the plaintiffs should have either traversed the discharge *as alleged, or should have new assigned. [WILLIAMS, J.—*Morrison v. Chadwick* is an [*17 authority to show that this is a bad replication.]

H. T. Coles, contra.—[JERVIS, C. J.—It is difficult to discover precisely what the first count means,—whether it is meant to allege the

contract to have been to pay to Heale the rent due from the plaintiffs to Heale, or the rent due from the defendant to the plaintiffs under the demise which is the consideration for the promise.] This is not simply a contract for the payment of rent: it is a contract of indemnity. In *Harley v. King*, 2 C. M. & R. 18,† 5 Tyrwh. 692, it was held that the assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, though the action be not commenced until after he has assigned the premises. [WILLIAMS, J.—That has nothing to do with this case: the surrender here took place before the rent was due.] The indemnity for the breach of which the plaintiffs are suing, is a personal contract, wholly independent of the relation of landlord and tenant. [JERVIS, C. J.—The declaration states that the defendant promised the plaintiffs that he would pay *the said rent* to Heale: what rent does that mean?] That merely refers to the *amount*. [WILLIAMS, J.—The breach assigned is, non-payment of the rent to Heale.] In Jarman's Conveyancing,^(a) it is said: "As the assignment of a lease (though followed by the lessor's acceptance of rent from the assignee) does not discharge the lessee from his express covenants, it is usual for the assignee to give him an indemnity against these covenants, either by bond, or, which is more frequent, by a covenant inserted in the assignment itself. This deed, however, is commonly in the custody *18] of the covenantor (the assignee), *and a bond (b) is therefore sometimes preferred. But it is clear, that, even without an express contract, the law will raise an implied obligation in the assignee of a lease, to indemnify the lessee from the covenants contained in it: and, therefore, where A. assigned to B. certain leasehold premises, subject to the covenants in the lease on the lessee's part to be performed, it was assumed that the executors of A. might maintain an action against B. for breach of the covenants of the lease, by reason whereof damages had been recovered against the assignors: the only point, indeed, contested by the defendant, was, as to the *form* of the action, which, it was contended, should be an action of covenant; but the court held that an action upon the case would lie: *Burnett v. Lynch*, 5 B. & C. 589 (E. C. L. R. vol. 11), 8 D. & R. 368 (E. C. L. R. vol. 16)." [TALFOURD, J.—What is the contract here?] That, in consideration of being let into possession of the chambers, the defendant will indemnify the plaintiffs against liability for the rent to Heale. [WILLIAMS, J., referred to *Wolveridge v. Steward*, 1 C. & M. 644,† 3 M. & Scott, 561 (E. C. L. R. vol. 30), where it was held that an assignee who takes from a lessee leasehold premises by indenture endorsed on the lease, *subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease*, is not liable in covenant to the lessee, for rent which the lessee has been called on by the

(a) 3d edit., by G. Sweet, Vol. IV. p. 171.

(b) Or a counterpart of the indenture of assignment.

lessor to pay after the assignee has assigned over.] In *Barnard v. Duthy*, 5 Taunt. 27 (E. C. L. R. vol. 1), in covenant for seven quarters' rent, a plea showing a surrender before the last four of the seven quarters' rent accrued, was held bad on demurrer, *because it did not go to the whole breach*, and the breach is not entire, but part of it may be proved. That was the case of an assignment *of a lease. The sixth plea, therefore, affords no substantial answer to the first [*19 count.

The replication to the sixth plea is good. In *Stephen on Pleading*, (a) it is said: "It is a rule, that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading: for (as has been shown), it is the use and object of the inducement to give an explained or qualified denial, that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had previously been made in an indirect one. Now, an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the *absque hoc*, an answer, in substance, to the last pleading. Thus, in the first example, the allegation that E. B. was seised for life, and that that estate is since determined, is, in itself, in substance, an answer, as denying by implication that the fee descended from E. B. on the plaintiff. That sort of special traverse containing no new matter in the inducement, as in the last example, is no exception to this rule." The objection of duplicity is not applicable to a special traverse.

The seventh plea is double, setting up the agreement and the performance of it: or, if both together form but one single defence, the whole was properly put in issue by the replication.

The same answer may be given to the objection to the replication to the eighth plea. One of two tenants in common cannot evict, without the sanction of his co-tenant. (b)

*The replication to the eleventh plea may be regarded as a new assignment; and, though perhaps somewhat informal, it contains [*20 all the essential elements of a new assignment. In *Monkman v. Shepherdson*, 11 Ad. & E. 411 (E. C. L. R. vol. 39), 3 P. & D. 182, in debt for wages as hired servant, the defendant pleaded, that the plaintiff was hired on the terms, that, if he should be drunk during service, he should forfeit all wages then due; that, after the wages became due, and whilst the plaintiff was in the defendant's service, he was drunk, whereby he forfeited the wages in the declaration mentioned. The plaintiff replied, that, after the plaintiff was drunk, the defendant exonerated him from the forfeiture, and agreed to pay him the wages already due as aforesaid,

(a) 5th edit. p. 212, citing *Bac. Abr.* (H) 1; *Com. Dig. Pleader* (G. 20); *Anonymous*, 3 Salk. 353; *Dike v. Ricks*, Cro. Car. 336; (*Sir W. Jones*, 327, 1 Roll. Abr. 329, 3 Vin. Abr. 419, 420) *Matthews v. Taylor*, 2 M. & G. 667 (E. C. L. R. vol. 52), 3 Scott, N. R. 52.

(b) *Quere*.

and continued to employ him as such servant. To this the defendant new-assigned, that part of the wages accrued due before the plaintiff was drunk, and the rest afterwards; and that the plaintiff declared not only for the wages due before, but also for wages due after he so became drunk, and the defendant had notice thereof. It was held, that the replication and new assignment together were not double; for, the plea applied only to wages due before forfeiture, and the new assignment to wages due after. [WILLIAMS, J.—This would be bad if it was a new assignment: the previous pleading is, that the defendant took the benefit of the act after the rent became due.]

Willes, in reply.—The contract meant to be stated in the declaration in truth is, that the defendant will pay the yearly rent of 84*l.* to Heale, or, in default of his so doing, will indemnify the plaintiffs, and pay that same rent to them. In either view, the seventh plea is a clear answer to the action: it shows an accord and satisfaction, which prevents the plaintiffs from suing. *According to the decision of the Exchequer Chamber in *Wolveridge v. Steward*, contracts for the payment of rent are limited to the period of enjoyment. The replication, which puts in issue the allegation that the agreement in the plea mentioned was made by Coles for and on behalf of Smith, is too wide. [JERVIS, C. J.—The principal objections urged against the replication to the seventh and eighth pleas, are not pointed out as causes of demurrer.] They are objections of substance.

The court suggested to *Cole* the propriety of amending, but he declined to avail himself of the hint. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court.

In this case, there is no little difficulty in construing the first count of the declaration. It alleges that the plaintiffs were tenants of certain chambers, to one Heale, at the rent of 84*l.* per annum, payable quarterly, and that, in consideration that they would demise and underlet the chambers to the defendant, to hold as their tenant, at a rent of 84*l.*, payable quarterly, he promised them that he would pay the said rent to Heale, and that, if he should not do so, he would indemnify them in respect thereof, and would pay the same to them. The declaration then avers, that the plaintiffs did let the chambers to the defendant on the terms aforesaid, and that, under that demise, he held the chambers; that large sums of money, parcel of the rent aforesaid, became due from the plaintiffs to Heale; that the defendant did not pay it to Heale; that the plaintiffs paid him, and requested the defendant to pay them; but that he had not done so, &c.

*22] It is not easy to say whether, by this statement, the *plaintiffs mean to allege the contract to have been that the defendant promised to pay Heale the rent due from them to Heale, or the rent due from the defendant to them under the demise which is the consideration for his promise. But, whichever may be meant, the plaintiffs cannot,

we think, be understood as intending to allege that the defendant's promise to pay Heale was to extend further than his liability to pay rent under his own tenancy to the plaintiffs; and, consequently, we are of opinion that the sixth plea,—which is addressed to 84l., parcel of the rent mentioned in the first count, and which sets up as a defence, that, before it grew due from the plaintiffs to Heale, the tenancy of the defendant to the plaintiffs had ended by a surrender by operation of law,—is a good plea.

The plaintiffs have replied to it, by way of special traverse. To this replication, the defendant has demurred specially, on the ground that the inducement is inconsistent and incongruous with the traverse. And we think that it plainly is so: and therefore our judgment on this demurrer must be for the defendant.

The seventh plea is likewise addressed to the same sum of 84l.; and it alleges, that, before it became due from the plaintiffs to Heale, it had been agreed by and between the plaintiff Coles, *for and on behalf of himself and the plaintiff Smith, and with his authority*, and the defendant, that the defendant should quit and deliver up the possession of the chambers to the plaintiff Coles, and that, in consideration thereof, the defendant should be discharged from all further liability to pay any rent for the chambers, and that the defendant did accordingly deliver up possession to the plaintiff Coles, which he, on behalf of himself and the plaintiff Smith, accepted. Construing the first count of the declaration as we do, we think this also plea sets up a good defence by way *of executed contract, according to the case of *Gore v. Wright*, 8 Ad. [23 & E. 118 (E. C. L. R. vol. 35), 3 N. & P. 243.

The plaintiffs have replied to this plea, by traversing that it was agreed by and between the plaintiff Coles, *for and on behalf of himself and the plaintiff Smith*, and the defendant, that the defendant should be discharged from liability to pay any further rent, and that possession was accepted, in pursuance of the alleged agreement, in discharge of the defendant's liability, in manner and form, &c. To this replication the defendant has specially demurred, on the ground that it is double and multifarious, inasmuch as the plaintiffs have denied, not only the agreement alleged, but also the acceptance of the possession of the chambers in pursuance thereof.

It is unnecessary for us to decide whether this is a sufficient cause of demurrer, or whether the plaintiffs are entitled by their replication to deny the whole of the matters alleged in the plea, as constituting a single point of defence; because we are of opinion that the replication is bad, for another cause, not specially assigned, but which we regard as an objection of substance, viz. that the traverse is too large, by reason of its including the allegation in the plea of the agreement therein mentioned having been made by the plaintiff Coles *for and on behalf of the plaintiff Smith*, as well as of himself. The case of *Wallace v. Kelsall*,

7 M. & W. 204,† 8 Dowl. P. C. 841, 1 H. & W. 25, appears to us to prove that the plea would contain a good bar, without this allegation. If this be so, the traverse is bad (and, in our opinion, bad on general demurrer), if it would put the defendant, on the trial of the issue, under the necessity of proving the allegation in order to obtain a verdict. And we have come to the conclusion that this would be the effect of the traverse, after considering the authorities relating to the point; the *24] principal of *which are cited and fully discussed in the judgment of the Court of Exchequer in the late case of *Lush v. Russell*, 5 Exch. 203;† though the decision itself of that case does not at all govern the present point. Therefore, on this demurrer also, our judgment must be for the defendant.

The eighth plea is also addressed to the same sum of 84l., and alleges that, before it became due from the plaintiffs to Heale, the plaintiff Coles, *with the sanction and authority of the plaintiff Smith*, evicted the defendant from the chambers. The plaintiffs have replied, traversing that the plaintiff Coles evicted the defendant *with the sanction and authority of the plaintiff Smith*.

To this replication the defendant has demurred; and it appears to us to be open to the same objection as the replication to the seventh plea, viz. that the traverse is too large, by reason of including the immaterial allegation that the eviction was authorized by the plaintiff Smith. On this demurrer, therefore, our judgment must likewise be for the defendant.

The eleventh plea is addressed to the second and third counts of the declaration,—the former being for use and occupation, and the latter on an account stated: and it avers, that, after the causes of action accrued, and before action brought, the defendant was discharged by the order and adjudication of the insolvent debtors' court. The plaintiffs have replied, as to so much of this plea as relates to the third count, that the cause of action accrued after the order and adjudication in the plea mentioned. To this replication, the defendant has demurred specially, on the ground of its amounting merely to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action. And, as this is plainly a fatal objection to the replication, our judgment on this demurrer also must be for the defendant.

Judgment for the defendant.

*DOE d. PRIOR and Others v. ONGLEY.

[*25

A., in May, 1823, demised premises to B. for 80 years, with a proviso for re-entry in case the lessee, his executors, &c., should exercise or carry on, or permit to be exercised or carried on, the business (amongst others) of a victualler or publican. B., in November, 1823, mortgaged to C., and in June, 1829, the mortgage term was assigned to D., and ultimately became vested in E.

After B. had assigned to C. and when he had no reversion, but a mere equity of redemption, he, by indenture, granted an underlease for 76 years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the meane assignments were made subject to this underlease.

In ejectment by the legal representatives of E. for a breach of the covenant in the original lease, in using the premises as a public-house or beer shop:—

Held,—first, that the underlease granted by B. operated merely as a demise by estoppel, inasmuch as he had not at the time of making it, or since, any legal interest;—secondly, that the lessors of the plaintiff, or the persons under whom they claimed, not being parties to the underlease, or to any of the assignments which recognised and referred to it, were not bound by any covenants contained therein;—thirdly, that the payment to, and acceptance by, E. of rent under the underlease by B. to F., merely created a tenancy from year to year; and that such tenancy was well determined by a notice to quit served upon the attorney of the administratrix of the person who had paid the rent to the lessors of the plaintiff, and under whom the defendant claimed.

EJECTMENT, upon a power of re-entry, in the nature of an entry for a forfeiture, brought to recover possession of premises which had been used as a public-house or beer shop, in the parish of St. Mary, Lambeth, Surrey.

The cause was tried before WILDE, C. J., at the last Spring assizes, for the county of Surrey, when a verdict was found for the lessors of the plaintiff, subject to the opinion of the court upon certain points reserved.

In the following term, a rule was obtained by *Peacock*, on behalf of the defendant, calling upon the lessors of the plaintiff to show cause why a verdict should not be entered for the defendant, or a nonsuit.

Against this rule, *Channell* and *Shee*, Serjts., and *Bovill*, showed cause; and *Peacock* and *Bramwell* were heard in support of it. The facts, and the arguments which were urged on either side, are so fully adverted to in the judgment (which was prepared by WILDE, *C. J.), that it has been thought sufficient merely to note the authorities which were cited. [*26

On the part of the lessors of the plaintiff were cited—*Doe d. Hughes v. Bucknell*, 8 C. & P. 566 (E. C. L. R. vol. 34), *Brown v. Story*, 1 M. & G. 117 (E. C. L. R. vol. 50), 1 Scott, N. R. 9, and *Sturgeon v. Wingfield*, 15 M. & W. 224.†

On the part of the defendant,—*Stokes v. Russell*, 3 T. R. 678, *Pleasant d. Hayton v. Benson*, 14 East, 234, *Webb v. Austin*, 7 M. & G. 701 (E. C. L. R. vol. 62), 8 Scott, N. R. 419, *Gouldsworth v. Knights*, 11 M. & W. 337,† *Sturgeon v. Wingfield*, *Omelaughland v. Hood*, 1 Roll. Abr. 874;(a) Vin. Abr. *Estoppel* (N.), pl. 5, (Q.), pl. 10; Bac. Abr. *Leases*

(a) *Estoppel* (Q.), pl. 10; translated, 10 Vin. Abr. *Estoppel* (Q.), pl. 10; (U.), pl. 5, S. C. Mar. 64, per nom. *Edwards v. Omellhallum*.

(G) 4, (I) 2, (I) 4, (O); Co. Litt. 300 b; 2 Wms. Saund. 418 c, n. (e) to Walton v. Waterhouse; 1 Smith's Leading Cases, 22, 310.

Cur. adv. vult.

TALFOURD, J., now delivered the judgment of the court.

This was an action of ejectment tried at the last assizes for the county of Surrey, in which it was sought to recover possession of certain premises used as a public-house, when a verdict was found for the plaintiff, subject to the opinion of the court on certain questions which were reserved: and this rule was afterwards obtained by the defendant, calling upon the lessors of the plaintiff to show cause why a verdict should not be entered for the defendant, or why a nonsuit should not be entered.

The lessors of the plaintiff claimed to be entitled to recover the possession of the premises on one or other of two grounds, that is to say, *27] either upon the ground *that they were entitled to the reversion expectant upon the determination of a lease for an unexpired term, upon which a right of re-entry had accrued by reason of a forfeiture by a breach of covenant, or upon the ground that the premises were held under them, upon a tenancy from year to year, which tenancy had been determined by a regular notice to quit.

The facts are somewhat complicated, and have given rise to several questions, some of which, according to our view of the case, it will not be necessary further to discuss.

It appeared by the evidence that Lord Holland was the ground-landlord of the premises in question; that he, by indenture dated the 30th of May, 1823, demised them to James Crundall for a term of 80 years, from the 14th of June, 1821, at a certain annual rent; that such lease contained the covenant hereinafter mentioned, with a proviso for re-entry, in case of breach:—"And, further, that he the said James Crundall, his executors, administrators, and assigns, or any of them, shall not, without the license in writing of the said Henry Richard, Lord Holland, his heirs and assigns, exercise or carry on, or suffer to be exercised or carried on, on the said premises, the trade of a catgut-spinner, hogskinner, boiler of horseflesh or bones, soap-maker, glue or size-maker, brewer, distiller, felt or hat manufacturer, melter of fat, metal-founder, slaughter-man, tin-man, *victualler*, *publican*, or any other offensive trade," &c. &c.

By indenture, dated the 21st of November, 1823, Crundall assigned the lease to Mrs. O'Brien, by way of mortgage.

Further, by indenture of the 8th of June, 1829, between Mrs. O'Brien, Crundall, and Yates, endorsed on the original mortgage, the term was assigned by Mrs. O'Brien to Yates.

*28] *By indenture of the 19th of February, 1830, Yates and Crundall assigned the mortgage term to Brooking, freed from the equity of redemption by Crundall.

By indenture of the 27th of March, 1839, Brooking assigned the term to two ladies of the name of Thorn; and, by indenture of the 24th of

June, 1841, the Misses Thorn assigned the term to Jonathan Charles Prior. Prior died possessed of the term; and the lessors of the plaintiff are the legal personal representatives of Prior, and so are possessed of the term.

The defendant is in the actual occupation of the premises; having derived the occupation under Thomas Ongley. Thomas Ongley was tenant to Meux & Co. Meux & Co. paid rent to one Currie for some time; and Currie paid rent to Prior from 1842 to 1847. Currie died, and his widow became his personal representative; and a notice to quit was served upon her, under the circumstances hereafter mentioned, and upon Thomas Ongley, and also upon the defendant.

Such is the general nature of the title of the lessors of the plaintiff, as it appeared in evidence: but the complication of circumstances referred to has arisen out of the fact that Crundall, after he had assigned his term to Mrs. O'Brien, and when he had no reversion, but only an equity of redemption, by indenture dated the 14th of July, 1825, purported to demise to Woods the premises in question for a term of $76\frac{1}{2}$ years, subject to a similar covenant restrictive of the use of the premises, and the like proviso for re-entry in case of breach, as was contained in Crundall's lease. And one of the material questions in the cause, is, how far the lessors of the plaintiff are affected by this lease,—to which, however, they have been willing to give effect, if the parties claiming under it would perform the covenants contained in it. But, on the part of the defendant, it is contended that the lessors of the plaintiff are bound by the term, but cannot *enforce the covenants by action, or avail themselves of the forfeiture by the breach of the covenants; and [*29 such contention on the part of the defendant is sought to be maintained, under the following circumstances:—

After Crundall had granted the lease to Wood, an indenture was executed by Crundall and Brooking, dated the 24th of October, 1825, purporting to be made between Crundall of the first part, O'Brien of the second part, and Brooking of the third part,—which recited the lease from Lord Holland to Crundall, and also the assignment of that lease to O'Brien by way of mortgage. It likewise recited a lease granted by Lord Holland to Crundall, of other premises, dated the 18th of July, 1825, and that such last-mentioned lease was assigned to Brooking by way of mortgage to secure 500*l.* and interest; and further recited the lease to Woods, and stated that O'Brien had consented and concurred in the demise so made to Woods, and that, at the time of such consent and concurrence, it had been stipulated and agreed, that, in consideration thereof, Crundall should assign to O'Brien other property of sufficient value, to indemnify her from loss by the consequent diminution in value of the mortgage security; and that, in execution of such agreement, Crundall had agreed to assign to Brooking, as trustee for O'Brien, the equity of redemption of the leasehold premises in mortgage to

Brooking, and to give O'Brien a power of sale of the premises mortgaged to her; and by such deed, Crundall accordingly assigned to Brooking the premises demised by the lease of the 18th July, 1825, and his equity of redemption therein,—in trust to sell, under the circumstances therein mentioned, and to apply the proceeds, in the first place, to the payment of his (Brooking's) mortgage, and, in the next place, to pay O'Brien, to the extent of 500*l.*, in part satisfaction of her mortgage debt, and to *30] pay the surplus proceeds, *if any, to him, Crundall: and a power of sale is then given, under the circumstances and conditions therein mentioned, to O'Brien, of the premises in mortgage to her, subject, nevertheless, to the covenants and agreements contained in the lease granted by Crundall to Woods.

This deed gave rise to many observations in the course of the argument of the rule. But, although O'Brien purports to be a party to the deed, yet it was never executed by her; nor is it in any manner noticed in any other deed executed by her. And we, therefore, think it can have no effect in this case, and need not be further considered.

The assignment by O'Brien to Yates, by the deed of the 8th of June, 1829, before mentioned, was made subject to the under-lease to Woods; but the assignment of the 19th of February, 1830, from Yates and Crundall to Brooking, made no reference to the under-lease to Woods: nevertheless, the assignment of the 27th of March, 1839, from Brooking to the Misses Thorn, and the assignment from the Misses Thorn to Prior, were both made subject to the under-lease.

It further appeared in evidence, that, after the lease was granted to Woods, the premises had been used as a public-house and beer shop, and that various notices had been given by Prior of the breach of covenant thereby committed, and requiring that such use of the premises should be discontinued.

It was proved that the use of the premises as a public-house and beer shop had been discontinued for a time, but that they were afterwards again applied to those purposes: and, in consequence of the parties persisting in so using the premises, the present action of ejectment was brought.

On the part of the plaintiffs it was contended, that, if they were bound *31] by the term demised to Woods, a *forfeiture had been incurred, which entitled them to re-enter and determine the term; or, if they were not bound by the term, the notices to quit had determined any other tenancy that could be set up on the part of the defendant: and so, *quâcunque viâ datâ*, the plaintiffs were entitled to recover.

Upon the part of the defendant,—among many other points not necessary to be noticed,—it was insisted that the indenture between Crundall and Woods, of the 14th of July, 1825, had become a good lease by estoppel, as against the lessors of the plaintiff, and, as such,

the lessors of the plaintiff were bound by the term ; but, it being a good lease only by estoppel, the lessors of the plaintiff could not take advantage of the forfeiture,—according to several authorities cited, upon which, or upon their application to this cause, it will not be necessary to remark.

It was further contended by the defendant, that, by the true construction of Crundall's lease, the application of the premises to the purposes of a public-house or beer shop did not work a forfeiture, but only created a claim to compensation ; or, at most, that a forfeiture would only be incurred after failure to make compensation after demand of the same had been duly made, according to the terms of the deed : and it was objected, that no such sufficient demand had been made, either in regard to the form of demand, or in respect of the service of such demand on the proper parties.

In the course of the argument upon these points, many principles were stated, and authorities cited, which were not the subject of any doubt ; but the great difficulty has been to discover their application to the facts of this case.

The main point in contest has been, whether, as between the lessors of the plaintiff and the defendant, the rights of such lessors are affected by the indenture *of the 14th of July, 1825, between Crundall and Woods, purporting to be a lease. [*32

Upon this point, it must be remembered that Crundall had no legal interest in the premises at the time he executed the deed. He had only an equity of redemption. That deed, therefore, only operated as a contract between the parties to it, or, as between them, to a demise by estoppel. Crundall has never since acquired any interest or reversion in the premises, and therefore the legal character and incidents of that deed have never been altered from what they were at the time of its execution. By the assignment of Crundall's equity of redemption to Brooking, no operation was produced in regard to that contract ; it was the assignment of a mere equity, having no operation at law ; and Crundall has not been party to any other deed which could affect the parties who have derived titles under the assignment of Brooking. It is the fact, that O'Brien assigned to Yates, subject to Woods's lease, and that Crundall was an assenting party to that deed : but he assigned nothing, and he had no assignable legal interest : and, in the assignment of his equity of redemption to Brooking, by the deed of the 19th of February, 1830, no notice whatever was taken of Woods's lease. It is the fact also, that Brooking assigned to the Thorns, subject to the under-lease, and the Thorns in like manner assigned to Prior.

The result is, that the deed between Crundall and Woods, purporting to be a lease, operated by way of contract between them, and which would bind them, as between each other, by estoppel : and, as Crundall

never acquired any interest in the premises he so assumed to demise, he never possessed the power of giving any legal interest in that contract to any other person: and he never affected to do so, by executing any *33] instrument even purporting to assign it. And, *although some of the assignments before mentioned were made subject to the lease to Woods, yet, whatever might be the effect of that fact, such effect was limited to the parties to the deeds, and neither Crundall, nor the defendant, nor any person under whom the defendant claims, or with whom he has any legal privity, was party to any such deeds, or in any manner connected with them.

We therefore think that the lessors of the plaintiff are in no respect bound by or affected by the lease to Woods. And this view of the case renders it unnecessary to consider the construction or effect of that deed, or of any of the notices which have been served under it.

The defendant, as before stated, acquired the possession of the premises from Thomas Ongley, who was let in under Meux & Co., who acquired their right to give that possession under Woods, and Woods, under the lease from Crundall. The payment of rent by Meux & Co. to Mrs. Currie, and the payment of rent by Currie to Prior, constituted Prior the landlord of Currie and of those claiming under him,—which included Meux & Co., Thomas Ongley, and the defendant. It is true that the rent paid by Currie to Prior was the amount reserved under the lease to Woods; and no doubt it was paid as under that lease: but, as Prior was not bound by that lease, the effect of the payment of rent was, to create a tenancy from year to year between them. Likewise, the rent paid by Meux & Co. to Currie, was paid as under a lease granted by Woods to them, but which lease, for want of a good reversion in Woods, for the reasons before mentioned, in reference to the deed between Crundall and Woods, operated merely as a contract, or by way of estoppel, between the parties: but, as regards the lessor of the *34] plaintiff, the only effect of the facts, is, to *show that the present actual possession being derived from Woods, who claimed under Crundall the title of the lessors of the plaintiff to the possession by virtue of the term assigned by Crundall, cannot be controverted by Meux & Co., or by Thomas Ongley, or the defendant, who, as before stated, derived possession from them.

A point was made, upon the evidence of Woods, that he had never assigned to Currie his interest under the lease from Crundall; but it does not appear to us that that circumstance can affect the lessors of the plaintiff. Currie's having paid the rent, as upon his own account, to Prior, from 1842 to 1847, was sufficient evidence of the relation of landlord and tenant, as between them: and the like effect resulted from the payment of rent from Meux & Co. to Currie.

The lessors of the plaintiff have *prima facie* acquired the right of possession under the term granted by Lord Holland; and it appears

that the parties in the actual occupation have acquired possession mediately under that term, and that the several facts serve only to show an outstanding interest under a tenancy from year to year, which may properly be determined by regular notice to quit, and that the lessors of the plaintiff are, therefore, entitled to retain the verdict which was entered for them at *nisi prius*.

One objection was made as to the service of the notice to quit: but there does not seem any weight in that objection. The notice was served upon the attorney and agent of Mrs. Currie, the administratrix of Currie, who paid the rent: and we think the notice was well served.

Rule discharged.

*KEPP and Another v. WIGGETT and Others. Nov. 19. [*35

Sureties in a bond given by a collector of property and income tax, under the 5 & 6 Vict. c. 35, conditioned for the due collection and payment of the sums assessed under the act, are not liable in respect of moneys collected by him without legal authority,—that is, before he is furnished with the duplicate assessment and warrant to collect, as mentioned in the 172d section of the statute.

The condition recited that A. “had been duly nominated and appointed a collector for the year ending,” &c.; and that duplicates of the assessments had been delivered and given in charge to him, with a warrant or warrants for collecting the same:—Held, in an action against the sureties, for A.’s default, that they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, and that the duplicate assessments and warrant to collect had not been delivered to him.

THIS was an action of debt. Judgment having been given for the plaintiffs on demurrer to a general plea of performance, (a) a writ of inquiry issued to assess the damages sustained by the plaintiffs by reason of the breaches. The writ of inquiry set out the pleadings and the judgment. The bond and consideration, as set out upon oyer, and enrolled, at the prayer of the plaintiffs, (b) were as follows:—

“Know all men by these presents, that we, James Lee, of, &c., collector, James Wiggett, of, &c., Richard Robinson, of, &c., and George Robinson, of, &c.,—which said James Lee is a collector for the wards of New Street, Bedfordbury, Drury Lane, and Long Acre, in the parish of St. Martin-in-the-Fields, in the division of the city and liberty of Westminster, in the county of Middlesex, duly nominated and appointed by the commissioners acting for the said parish of St. Martin-in-the-Fields, in the execution of an act of parliament made and passed, &c. (5 & 6 Vict. c. 35), and of the several other acts therein referred to, and of another act, &c. (8 & 9 Vict. c. 4), and which said James Wiggett, Richard Robinson, and George Robinson, are sureties for the said James Lee,—are jointly and *severally held and firmly bound unto Richard Kepp, Esq., and Charles Lewis, Esq., being two of the [*36 said commissioners acting in the execution of the said acts for the said

(a) 6 Com. B. 280 (H. C. L. R. vol. 60).

(b) 6 Com. B. 283.

parish of St. Martin-in-the-Fields, in the said county of Middlesex, in the sum of 8000*l.* of lawful money of Great Britain, to be paid to the said Richard Kepp, Esq., and Charles Lewis, Esq., or to William Everett, Esq., their executors or administrators; for which payment to be well and truly made, we bind ourselves, and each of us bindeth himself, for the whole and entire sum, our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals: Dated, this 6th day of October, 1846.

Whereas the above-bounden James Lee *hath been duly nominated and appointed a collector* for the year ending the 5th day of April, 1847, of the several duties granted by the said several acts, which have been, or hereafter shall be, assessed within the said wards and parish of St. Martin-in-the-Fields for the said last-mentioned year, under and by virtue of the said acts; and the said James Lee, together with the said James Wiggett, Richard Robinson, and George Robinson, as his sureties, have entered into and executed the above-written obligation to give good and sufficient security for the faithful discharge and due performance by the said James Lee of his said office of collector as aforesaid: And whereas *duplicates of the assessments have been delivered* and given in charge to the said James Lee, with a warrant or warrants for collecting the same: Now, the condition of the above-written obligation is such, that, if the above-bounden James Lee, James Wiggett, Richard Robinson, and George Robinson, or either of them, their or either of their heirs, &c., shall and do duly, in pursuance of the directions of the said acts, pay all such sums of money which now are assessed and collected for the year *37] ending the 5th of April, 1847, *or which hereafter may be assessed and to be collected in the said wards and parish of St. Martin-in-the-Fields, by the said James Lee, as such collector as aforesaid; and if the said James Lee shall and do duly, in pursuance of the said acts, demand the sums assessed, of the respective persons from whom the same are payable, and, in case of non-payment thereof, shall duly enforce the powers of the act against such as make default; then the above-written obligation to be void; otherwise the same shall be and remain in full force and virtue."

After setting out the judgment on the demurrer, the writ of inquiry proceeded thus:—

"And thereupon the said Richard Kepp and Charles Lewis, according to the form of the statute in that case made and provided, suggested upon the roll whereon the said judgment so recovered against the said James Wiggett, Richard Robinson, and George Robinson as aforesaid, is entered, to the effect following, that is to say, that the said James Lee did not nor would, duly, in pursuance of the directions of the said acts, pay or cause to be paid, nor had he at any time theretofore paid, all such sums of money as at the time of the making of the said writing obligatory and condition were assessed, and which thereafter were as-

assessed and collected in the said wards and parish of St. Martin-in-the-Fields, by the said James Lee, as such collector as aforesaid, for the year ending on the 5th of April, 1847, but therein failed and made default; and the said James Lee neglected and omitted, duly, in pursuance of the directions of the said acts, to pay, and did not pay, nor had he then paid, according to the true intent and meaning of the said condition of the said writing obligatory, divers large sums of money, to wit, 1000*l.*, assessed and collected by him, the said James Lee, as such collector as aforesaid, in and for the said wards and parish of St. Martin-in-the-Fields, for the year ending *the 5th of April, 1847, to wit, [*38 amongst others, certain large sums of money, amounting, to wit, to 501*l.* 0*s.* 6*d.*, collected and received by him, the said James Lee, as such collector as aforesaid in and for the said wards and parish aforesaid, for the year ending as aforesaid, from certain persons carrying on business under the name, style, and firm of Messrs. Combe, Delafield, & Co. [and seven other sums collected and received by Lee, as such collector as aforesaid, for the year ending as aforesaid, viz., 1*l.* 6*s.* 8*d.* from one Bickers, 1*l.* 9*s.* 2*d.* from one Watts, 5*l.* 2*s.* 11*d.* from one Cockings, 8*l.* 5*s.* 1*d.* from one Blunt, 6*s.* 5*d.* from one Weston, 14*s.* from one Huntley, and 14*s.* 7*d.* from one Huggins]; and which said several sums of money so collected and received as aforesaid, he, the said James Lee, might, and could, and ought to have duly paid in pursuance of the directions of the said acts, and according to the form and effect, true intent and meaning of the said condition of the said writing obligatory; but the said James Lee had not paid the same, or either of them, or any part thereof, contrary to the said condition of the said writing obligatory, and in breach thereof, whereby the said Richard Kepp and Charles Lewis had lost the said moneys, and every part thereof: But because, &c."

Then followed the prayer and award of the writ of inquiry,—the execution of which was alleged as follows:—"The said writ was executed at Westminster, on the 5th day of February, 1849, before," &c.

The damages were assessed at 513*l.*, and costs of suit, subject to be reduced to nominal damages, or such other sum as the court should think the plaintiff entitled to recover, according to the opinion of the court on the following case:—

The plaintiffs are two of the commissioners of the property and income-tax for the parish of St. Martin-in-the-Fields, in the city [*39 and liberty of Westminster, *in the county of Middlesex, duly appointed under and by virtue, and acting in execution, of the statutes 5 & 6 Vict. c. 35, and 8 & 9 Vict. c. 4.

The said James Lee, from the coming into operation of the said act of 5 & 6 Vict. c. 35, acted as collector of the property and income-tax in and for the said parish of St. Martin-in-the-Fields.

The bond and condition set forth in the writ, was executed on the 6th

of October, 1846, by the said James Lee, and the defendants James Wiggett, Richard Robinson, and George Robinson. The said William Everett, Esq., was, and still is, Her Majesty's receiver-general of taxes. The said James Lee died on the 14th of October, 1846.

On the 22d of October, 1845, a duplicate of the first assessment of the duties under the respective schedules (A.) and (B.) of the act 5 & 6 Vict. c. 35, made upon the several persons charged with the said duties within the parish of St. Martin-in-the-Fields, for the year ending the 5th of April, 1846, to be and to remain in force for the space of three years commencing from the 5th of April, 1845, and ending the 6th of April, 1848, was delivered by the plaintiffs, acting as such commissioners, to the said James Lee: and, annexed to the said duplicate, and delivered at the same time by the plaintiffs to the said James Lee, was a document, under the hands and seals of the plaintiffs, in the following form,—being the form provided by the commissioners of stamps and taxes:—

[Here followed the collector's appointment, and warrant to collect sums assessed under schedules (A.) and (B.)]

The above warrant and appointment remained unrevoked during the life of the said James Lee.

*40] Previously to the delivery to the said James Lee of the said warrant and appointment, he was required to give, and did give, security, as such collector of the said duties, by a bond, with sureties, in precisely the same terms and form as the bond set forth in the said writ; and he had given a similar bond for each of the three years. The penalty of the bond, as appears by the declaration, is 8000*l*.

The total amount of the assessment under the schedules (A.) and (B.), for the year ending the 5th of April, 1847, was 2191*l*. 9*s*. 2*d*.; and the amount under schedules (D.) and (E.) was 4951*l*. 13*s*. 11*d*. The duties so assessed under schedules (A.) and (B.), and (D.) and (E.), were respectively due and payable at the same times: and the persons respectively assessed to and chargeable with both duties, were applied to for payment thereof at one and the same time, by the said James Lee.

After the death of James Lee, one Richard Thomas Pugh was duly appointed collector. With his appointment was delivered to the said Richard Thomas Pugh the duplicate assessment under schedules (A.) and (B.), formerly delivered to James Lee.

On the 12th of May, 1847, a return was made by the plaintiffs to the receiver-general, of the total amount of the duties assessed under schedule (A.), and also the total amount of duties assessed under schedules (D.) and (E.) respectively, for the year ending the 5th of April, 1847, in pursuance of the directions of the act of the 43 G. 3, c. 99, s. 46; in which said duplicate or return one Thomas Butlin and one Richard Thomas Pugh were stated to be the collectors of the whole amount of the said duties respectively.

The receipt by James Lee of the several sums hereinbefore mentioned, was first discovered by the said Richard Thomas Pugh, who, upon applying to the parties assessed, for the respective amounts due from *them, was informed by them that they had paid Lee; and his [*41 receipt was produced by them.

On the 12th of August, 1846, a meeting of the general commissioners of the property and income-tax for the parish of St. Martin-in-the-Fields, was duly held at the office of the said commissioners; at which meeting the plaintiffs and the said James Lee were present. The following minute details what took place at the meeting:—

“Office for Taxes, August 12, 1846.

“At a meeting of the commissioners of property-tax, held this day,—present, Charles Prater, Esq., in the chair, Richard Kepp, Esq., Robert Pugh, Esq., Charles Lewis, Esq., and William Stark, Esqr.,—the assessments of income-tax, schedule (D.), for the year ending the 5th of April, 1847, were delivered as completed by the additional commissioners. Ordered, that notice of assessment for the said year should be delivered to the parties assessed; and appointed Tuesday, the 29th of September, as the first day for hearing appeals against the said assessments. Messrs. Butlin and Lee were appointed collectors for the said year. Mr. Lee offered as his sureties, Mr. James Wiggett, of Drury Lane, brush-maker, Mr. Richard Robinson, of Bloomsbury Square, gentleman, and Mr. George Robinson, of Wigmore Street, auctioneer. The commissioners were pleased to approve of the same; and directed the clerk to prepare the necessary bonds.”

The bond and condition mentioned and set forth in the writ were duly executed at the offices of the said commissioners, by the said James Lee, and the said defendants, James Wiggett, Richard Robinson, and George Robinson, on the 6th of October, 1846.

The certificates of the assessments were duly made out by the additional commissioners, and entered in a book provided for that purpose, according to the forms *transmitted to them by the commissioners of [*42 stamps and taxes: but the appeals were not then concluded; and *no duplicate of assessment under schedule (D.), for the year ending the 5th of April, 1847, nor any warrant for collection of any of the said duties under schedule (D.) was delivered to the said James Lee: but he retained possession of the aforesaid duplicate of assessment under schedule (A.), with the warrant hereinbefore mentioned, thereto annexed.*

After the said assessments were made a notice in the proper and usual form was given to each of the several persons so assessed, including the persons hereinafter named, from whom the said James Lee received the moneys hereinafter stated: and no notice of appeal against such assessment was ever given; nor was any appeal made by either of the said last-mentioned persons so assessed.

The first appeal day in respect of the assessments made under schedule

(D.) was held, as appointed by the said minute, on the 29th of September, 1846. The appeals in respect of the assessments made under schedule (D.) were in the course of being heard until the end of October, 1846.

On the 14th of October, 1846, James Lee died.

On the 25th of November, 1846, a duplicate of the assessment, with a warrant in the following form, was delivered to the said Richard Thomas Pugh:—

“Schedules (D.) and (E.). County of Middlesex. District of St. Martin's-in-the-Fields. We, the undersigned commissioners for general purposes, amongst others, acting for the said district, do hereby sign and allow this duplicate of the first assessment of the said duties for the wards of New Street, Bedfordbury, Drury Lane, and Long Acre, for the year 1846, ending on the 5th of April, 1847, amounting to the said sum of 4951*l.* *13*s.* 11*d.* Given under our hands and seals, this *43] 25th of November, 1846.

“RICHARD KEPP (L. S.)

“CHARLES LEWIS (L. S.)

“Commissioners.”

“Collector's appointment and warrant. County of Middlesex. District of St. Martin's-in-the-Fields, to wit. To Richard Thomas Pugh and Thomas Butlin, two of the inhabitants of St. Martin's-in-the-Fields, in the district of St. Martin's-in-the-Fields, in the county of Middlesex. By virtue and in pursuance of, &c., we whose names are hereunto subscribed and seals affixed, being, amongst others, commissioners for the general purposes of the said acts, and acting for the said district, have signed and allowed the foregoing duplicate of the first assessment of the said duties charged and assessed upon the several inhabitants and others of the ward of New Street, Bedfordbury, Drury Lane, and Long Lane, in the said district, for the year 1846, ending the 5th of April, 1847, amounting to the sum of 4951*l.* 13*s.* 11*d.* Now, we do hereby appoint you collectors of the duties contained in the said assessment; and we do hereby enjoin and require you, or either of you, to make demand of *the several sums contained in the foregoing duplicate of assessment*, from the parties charged therewith, or at the places of their last abode, as the case may require, within ten days after the duties shall respectively become payable, next after the delivery to you of the said duplicate of assessment; and, upon payment thereof, to give acquittances, &c. Given under our hands and seals, the 25th of November, 1846.

“RICHARD KEPP (L. S.)

“CHARLES LEWIS (L. S.)

“Commissioners.”

On the 20th of September, 1846, and before the receipt by the said James Lee as hereinafter mentioned, *the following sums were due *44] and payable for two quarterly instalments of property-tax or duties granted under Schedule (A.), by the respective persons whose names

are set opposite to the same respectively, in respect of the year ending the 5th of April, 1847, in the parish of St. Martin's-in-the-Fields. [Here followed an enumeration of sums, in the whole amounting to 52l. 4s. 6d.]

On the 20th of September, 1846, and before the receipt by the said James Lee as hereinafter mentioned, the following sums were due and payable for two quarterly instalments of property-tax or duties granted under schedule (D.), by the respective persons whose names are set opposite to the same respectively, in respect of the year ending the 5th of April, 1847, in the parish of St. Martin-in-the-Fields :—

Under schedule (D.)	£	s.	d.
Messrs. Combe, Delafield, & Co. - - - -	452	1	8
William Blunt - - - - -	2	9	0
Thomas Cockings - - - - -	2	18	4

Upon application to them by the said James Lee, the said several sums above particularly mentioned, were paid to him by the said parties respectively, in respect of the said last-mentioned year; and the said James Lee gave to the said parties respectively a printed receipt for the same, in the usual form, as collector of the said duties, dated on the days when such payments were made.

The above sums received under schedule (D.) were received on the 26th of September, 5th of October, and 7th of October, respectively.

The case then stated that none of the said moneys so received by the said James Lee as aforesaid, had ever been paid, either by the said James Lee, or by the said defendants, or either of them, as his sureties, or by any other person on his or their behalf, though the days *ap- [*45 pointed for payment of all sums collected for 1847, had elapsed.

The question for the opinion of the court, is, whether the verdict ought to be reduced, and, if so, by how much.

It is to be taken as a fact that the parties who paid Lee have, upon appeal, insisted upon those payments as a discharge, and refused to pay. The court is to be at liberty to draw such inferences of fact as the case may warrant.

Channell, Serjt., for the plaintiffs.—The bond in question was executed on the 6th of October, 1846. Lee, the collector, for whose default the plaintiffs now seek to charge his sureties, died on the 14th. Some of the sums mentioned in the case were received by him before, others after the execution of the bond. These may be considered as sums received under schedules (A.) and (D.) respectively.

As to the duties received under schedule (A.) the circumstances appear to be these :—An assessment of property-tax was made for three years : a duplicate of the assessment was delivered to Lee, together with an appointment of Lee as collector, and a warrant authorizing him to collect : the three years would not expire until the 5th of April, 1847.

As to schedule (D.), there is no statement in the case that a dupli-

cate assessment, with a warrant to collect, was delivered to Lee: and for this reason,—the assessment is subject to appeal, and therefore the duplicate could not be delivered out until the appeals were disposed of; and the case states that the appeals were in the course of being heard until the end of October, 1846. It will be contended, on the other side, that the sureties are not liable on this bond, for want of the delivery of *46] this assessment and warrant to Lee. But the *assessment made by the commissioners on the 12th of August, is complete, unless notice of appeal is given; and the case finds that none of the parties with the receipt of money from whom Lee is charged, gave such notice; and it further finds expressly that the sums mentioned were due and payable. As to these, therefore, there was a valid assessment; and it is not competent to the defendants to say that Lee was not such a collector as alleged.

With regard to the duties to be collected under schedule (A.), there can be no doubt that the defendants are liable for the sums (amounting in the whole to 52*l.* 4*s.* 6*d.*) received by Lee, under assessments duly made under the authority of the 5 & 6 Vict. c. 35, s. 87, and 8 & 9 Vict. c. 4, s. 3. [This was conceded by *Byles*, Scrjt., for the defendants.]

Then, as to schedule (D.), the omission of the commissioners to deliver to Lee a duplicate assessment and warrant to collect, does not entitle the defendants to say that Lee did not receive the money. The 172d section of the 5 & 6 Vict. c. 35, enacts “that the respective commissioners executing this act in relation to any of the duties hereby granted, shall, within one calendar month after the first day of hearing appeals, —all appeals then made being first determined,—issue out and deliver to the respective collectors, duplicates of the assessments of the aforesaid duties, charged at the respective rates mentioned in the respective schedules of this act, together with their warrants, as directed by the said several acts relating to the duties of assessed-taxes, for the speedy and effectual levying and collecting of the said duties assessed under this act, as the same shall become payable,” &c. There is nothing in that section to prevent the assessments from being due and payable, although the duplicates have not been delivered out, as to persons who have not given notice *of appeal. The object of the *47] statute is, prompt collection: this appears from the 12th section of the 43 Geo. 3, c. 99, which is, by s. 36, incorporated into the 5 & 6 Vict. c. 35. That section (s. 12) enacts “that the assessors so to be appointed as aforesaid (under s. 9) shall from time to time make and deliver in writing their certificates of assessments of all the duties given to them in charge as aforesaid, unto the respective commissioners, or any two or more of them, on or before the 5th of June yearly, or as soon after as conveniently can be done; and the commissioners to whom such assessments shall be so delivered, or any two or more of them, shall

forthwith set their hands to the said respective assessments, testifying their allowance of the same; and the said commissioners, or any two or more of them, are hereby required to sign and seal three duplicates of the said assessments to be prepared by their clerk, and forthwith to nominate and appoint two of the persons named or presented in each of such assessments to be collectors, or any other two such persons as such commissioners are hereby authorized to appoint, and to deliver, or cause to be delivered, one of the said duplicates of such assessments so by the said commissioners allowed, together with warrants, under the hands and seals of two or more of the said commissioners, for collecting the same, unto the respective persons by them nominated to be collectors; and one other of the said duplicates to the surveyor of the district for the time being; and the third of the said duplicates to be kept by such clerk for the use of the said commissioners; and the said collectors are hereby enjoined and required to make demand of the several sums contained in such duplicates, from the parties charged therewith, or at the places of their last abode, or on the premises charged with the assessment, as the case may require, within ten days after the said duties shall respectively become *payable, next after such assessments shall have been delivered to them." [MAULE, J.—Under the 43 [*48 G. 3, c. 99, the warrant pointed out the very sums to be collected. Here, the parties assessed are to have notice so that they may appeal. The notice under the former act was the demand. Under the 5 & 6 Vict. c. 35, the assessment and warrant under schedule (D.) are not delivered to the collector until the appeals are disposed of. How, then, can he know what he is to collect? or, how are the parties assessed to know to whom they are to pay the money? JERVIS, C. J.—Webb v. James, 7 M. & W. 279,† 4 Dowl. P. C. 487, 1 Gale, 260, is an authority to show that the sureties are not responsible for sums received by the collector without due authority.]

It is not competent to the defendants to deny that the sums in question were legally received by Lee in his character of collector. The bond recites that Lee "hath been duly nominated and appointed a collector for the year ending the 5th of April, 1847, of the several duties granted by the said several acts, which have been or hereafter shall be assessed within the said wards and parish," &c.; and that "duplicates of the assessments have been delivered and given in charge to Lee, with a warrant or warrants for collecting the same." And the plaintiffs are not precluded by the known rule from relying upon that estoppel now, seeing that they have had no opportunity of putting it upon the record. [JERVIS, C. J.—A similar argument was urged, without success, in *Doe v. Huddart*, 2 C. M. & R. 316.(a)]

Byles, Serjt. (with whom was *Ogle*), for the defendants.—The defendants are clearly not responsible for Lee's default in respect of moneys

(a) And see *Doe v. Wellsman*, 2 Exch. 368.†

*49] received by him *out of the due course of his office. The collector's authority is derived wholly from the duplicate assessment and the warrant: until he receives these, he has no right to collect one farthing. The commissioners cannot by law deliver out the duplicates until the appeals are all disposed of: 5 & 6 Vict. c. 85, s. 172. [MAULE, J.—Is it not reasonable that persons who do not choose to appeal, may have some person to whom they may legally pay the sums for which they are assessed, before the time for hearing appeals is over?] The facts show that this was an extra-official collection, to the prejudice of the sureties. On the 22d of October, 1846,—probably, after the giving of the bond for that year,—the commissioners delivered to Lee a duplicate of the first assessment of duties under schedule (A.), to remain in force for three years, commencing from the 5th of April, 1845, and ending on the 6th of April, 1848. On the 12th of August, 1846, the assessments of income tax, schedule (D.), for the year ending the 5th of April, 1847, were delivered as completed,—subject to appeal. Notice of the assessment is to be given to the parties assessed, and days are appointed, for hearing appeals. Then, collectors are on that day appointed,—to collect the various sums assessed, when they should be armed with proper authority so to do. On the 5th of October, 1846,—the day before the bond is executed,—Lee, one of the persons so appointed, receives from Messrs. Combe & Co. 452*l.* 1*s.* 8*d.* At this time, the money was not lawfully receivable by Lee: he could not act officially until the assessment and warrant were delivered to him. Lee died on the 14th of October, 1846: a new collector (Pugh) was appointed on the 28th: on the 31st, the appeals were all disposed of; and, on the 25th of November, the duplicate assessment and warrant to collect were delivered to Pugh, *50] containing the names of Messrs. *Combe & Co. If Pugh, the new collector, had demanded the sum assessed upon Messrs. Combe & Co., it would have been no answer for them to say that they had paid the amount to Lee: that was a payment in their own wrong. In *Leigh v. Taylor*, 7 B. & C. 491 (E. C. L. R. vol. 14), it was held that an overseer has not, by virtue of his office, any authority to borrow money; and, therefore, in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, though applied by him to parochial purposes. That case, and *Webb v. James*, before adverted to, are distinct authorities to show that these defendants are only chargeable for sums *lawfully* received by Lee as collector, and not paid over.

The cases of *Doe v. Huddart*, 2 C. M. & R. 316,† 5 Tywrh. 846, 4 Dowl. P. C. 437, and *Doe v. Wright*, 10 Ad. & E. 763 (E. C. L. R. vol. 37), 2 P. & D. 672, show that the defendants are not precluded by any application of the doctrine of estoppel here.

Channell, Serjt., was heard in reply.

JERVIS, C. J.—It has very properly been admitted by the learned

counsel for the defendants, that they are liable in respect of all moneys received by Lee under schedule (A.) of the statute 5 & 6 Vict. c. 35; for, it is quite plain, on referring to the provisions of that statute, that the assessments under schedule (A.) are in force for three years. The plaintiffs, therefore, must have judgment for those amounts. But I think it must be limited to that. It is conceded, upon the authority of *Webb v. James*, that, unless the defendants are estopped from denying Lee's authority to collect the sums assessed under schedule (D.), they can only be liable in respect of sums officially received by the collector. [*51 It is important, therefore, to see whether or not there is any such estoppel. It appears to me that there is not. It appears to me that everything that is recited in the bond, is satisfied by the facts which are stated in the case. At the time the bond was executed, Lee had, in a certain sense, been appointed collector "for the year ending the 5th of April, 1847, of the several duties granted by the said several acts, which had been or thereafter should be assessed," &c. He had duly received the duplicate assessment and warrant to collect the assessments under schedules (A.) and (B.). The bond clearly contemplates a future collection. The question is, whether he was authorized to collect the sums which he is charged with having received. That he was appointed collector, is clear: but, was he ever armed with authority as such collector to receive the assessments under schedule (D.)? I am of opinion that he was not. It appears that certain returns are made by the assessors: notice is then given to the parties assessed, who have a power of appeal; and by s. 172, it appears that the assessments and warrant cannot be given out for collection, until the appeals are disposed of. Until that can be done, the collector cannot properly know what he is to collect, nor has he authority to collect. That being so, it seems to me that the defendants in this action are only liable upon their bond, to the extent of the sums received by the collector under schedules (A.) and (B.), and that our judgment must accordingly be for the plaintiffs for the amount of those sums only.

MAULE, J.—I am of the same opinion. As to the question of estoppel, it appears to me that the matters that are stated in the case,—some of them by recital in the condition of the bond,—and which were in the *knowledge of all parties, show, that, in speaking of the appointment of Lee as collector, they did not mean that he was fully [*52 armed with authority to collect the sums assessed. He had been appointed to collect, and was the person who was intended to be armed with power to collect and enforce payment of the sums assessed. Still, he was a collector within the sense and meaning of the expressions used in the bond. I therefore think the doctrine of estoppel does not apply. The only remaining question is, whether the money received by Lee as and for sums assessed under schedule (D.) of the statute 5 & 6 Vict. c. 35, was received by him in his character of collector. Looking at the provisions of the act, and at the general character of appointments of

this kind, I think he was not authorized to receive or to enforce payment of those sums: he had no authority lawfully to receive them, so as to bind the Crown, until empowered to do so by the receipt of the duplicate assessments and warrant from the commissioners: before that time, he could have no legitimate means of knowing what amounts he was charged to collect. The act does not, I think, intend that there shall be any collection until the time for appealing has expired: it would probably be inconvenient if it were given before. Indeed, my brother *Channell* has not contended for that. There is no writing, no verbal communication, between the commissioners, who have the custody of the assessments, and have power to give effect to them, and the collector, except one, which is made by handing over to him the duplicate and warrant. Where it is intended that the collection shall be made *forthwith*, the legislature has,—as in the 12th section of the 43 G. 3, c. 99,—expressly and conveniently in terms conferred the authority. That machinery does not exist in the statute now under consideration; but a different machinery *53] is substituted for it: the *commissioners are to make the assessments; they are to give notice of the assessment to the parties assessed: they are to appoint the time for hearing appeals against the assessments; they are to appoint collectors; and, after the time for hearing appeals is over, they are to deliver to them the duplicate assessments and warrants to collect,—so that the collectors may know what amounts they are to demand from the parties assessed. Taking the two acts (43 G. 3, c. 99, and 5 & 6 Vict. c. 35), which are *in pari materia*,—the one providing for a collection *forthwith*, the other for a collection after the determination of the appeals, and after the delivery of the duplicate and warrant to the collector,—I think the plain and obvious construction of the latter act, excludes the liability of the sureties on this bond, in respect of that part of the breach which relates to sums assessed under schedule (D.).

WILLIAMS, J.—I am of the same opinion. By the terms of this bond, the sureties can only be liable for such sums as Lee, the principal, could give legal discharges for. With regard to sums received by him in respect of the assessment under schedule (D.), Lee clearly had not authority to collect them, no duplicate or warrant to collect having been delivered to him by the commissioners; and consequently he could give no valid discharges. As to the remaining question,—whether the defendants are estopped by the recitals in the bond from setting up this defence,—it is to be observed that it is a rule that estoppels must be *certain* to every intent. And, here, it is at least doubtful whether the recital that Lee had been duly nominated and appointed a collector for the year ending the 5th of April, 1847, and that duplicates of the assessments had been delivered and given in charge to him, with a warrant or war- *54] rants for collecting the same, *should be referred to the assessments under schedule (A.) or schedule (D.). I therefore think there is no estoppel.

TALFOURD, J.—I am entirely of the same opinion. It is clear upon the facts stated in the case, that Lee never was armed with legal authority to receive the sums assessed under schedule (D.) of the income-tax act. The warrant afterwards given to Pugh, which is set out in the case, shows what was required to make the collection lawful.

Judgment for the plaintiffs for 52*l.* 4*s.* 6*d.*, the amount of the sums collected by Lee under schedule (D.).

BROWN v. ARUNDELL. Nov. 5.

Goods sent to an auctioneer for sale on premises occupied by him, are privileged from distress for rent; although the place of sale is merely hired for the occasion,—or the occupation has been acquired by the auctioneer by an act of trespass.

THE first count of the declaration was in trover for certain goods and chattels of the plaintiff; the second was in case for not selling for the best price goods taken as a distress for rent; the third, for selling without appraisalment.

Plea, 'not guilty, "by statute."

The cause was tried before **POLLOCK, C. B.**, at the last assizes at Hertford. The facts were as follows:—The defendant was lessee for a term of years of The Turf Hotel, at St. Albans. One Coleman had formerly kept the hotel; but, having got into difficulties, he had retained possession of "the tap" only,—the rest of the premises being let to two persons named Quick and Dell. The premises being at the time in question unoccupied, the key was left at the tap; and, Coleman's son, in the absence of his father, without (as it appeared) *any authority from any one, gave the key to one Page, who thereupon took [55 possession of one of the empty rooms of the hotel, and placed goods in it for the purpose of selling them by auction,—amongst others, the goods in question in this action, which were the property of the plaintiff. The defendant being informed that the goods were there, immediately distrained them for rent alleged to be due to him, in respect of the premises, from Quick and Dell. The goods were appraised, and (those belonging to the plaintiff) ultimately sold for 52*l.* Witnesses called for the plaintiff, valued the goods at from 70*l.* to 100*l.*

On the part of the plaintiff, it was insisted, upon the authority of *Adams v. Grane*, 1 C. & M. 380,† 3 Tyrwh. 326, that the goods, at the time of their seizure, were privileged from distress.

The lord chief baron was of that opinion, and accordingly directed the jury to find for the plaintiff on the first and second counts, and for the defendant on the third.

The jury thereupon found for the plaintiff on the first count, with 52*l.*

damages; also for the plaintiff on the second count, with 28l. damages; and, on the third count, for the defendant.

M. Chambers (with whom was *Hawkins*), pursuant to leave reserved to him at the trial, now moved for a rule nisi to enter a nonsuit. The rule laid down in *Adams v. Grane*,—that goods sent to an auctioneer to be sold *upon premises occupied by him*, are privileged from distress for rent,—is one that is established for the general benefit and protection of trade: it does not apply to a case where a room, not being a public auction-room, is hired for a mere casual sale. [MAULE, J.—What constitutes a *public* auction-room? Must it be *held in fee-simple? or *56] for a long term of years? or what?] It must be a place where the auctioneer carries on his ordinary business. [WILLIAMS, J.—In *Findon v. M'Laren*, 6 Q. B. 891 (E. C. L. R. vol. 60), to a plea in trover for a carriage, alleging that it was taken on the premises of B. as a distress for rent due from him, the plaintiff replied that B. was a coach-maker and a commission agent for the sale of carriages, and exercised that trade on the said premises, and was employed by the plaintiff, in the way of his said trade and business, for certain commission, to expose for sale, and sell, the carriage on the said premises, and the plaintiff had delivered the carriage to B. for the purpose that he might there expose for sale and sell the same for the plaintiff, in the way of his said trade and business, for certain commission, and B. had the same on the premises for that purpose, and the same remained thereon, to be managed, dealt with, sold, and exposed for sale, as aforesaid, in the way of B.'s said trade and business, and not otherwise, until the time of the distress: and it was held, that goods in the hands of a commission-agent for sale in the way of his business, are exempted from distress; and, on special demurrer, that the exemption was here sufficiently pleaded.] No doubt, goods sent to a factor for sale upon his premises, are exempt. But here, the room in which the goods were placed, was not the place of business of Page. [MAULE, J.—*Adams v. Grane* is not distinguishable from the present case.] Coleman the son had no authority to let Page into possession: the latter was a mere trespasser. [JERVIS, C. J.—How *can* that affect the privilege? If it could, the privilege would cease, if the auctioneer were to hold over after the *57] expiration of a lease or a notice to quit.] No case has ever decided, that, where *an auctioneer is guilty of a trespass in placing goods upon another man's premises, the goods so placed are privileged from being distrained. [MAULE, J.—I see no ground for making this case an exception out of the general rule. Trespassers do not lose *all* their rights. Besides, for anything that appeared here, nobody objected to Page's taking possession. Quick and Dell did not: and Coleman had no right to object.]

JERVIS, C. J.—It is admitted that this case is governed by *Adams v. Grane*, unless the circumstance of the auctioneer having obtained pos-

session of the room in question by means of what is called an act of trespass, creates a distinction. I do not think the evidence raises that question. And, if it did, I think there is no foundation for the suggestion. It is not to be tolerated that the application of a rule of general convenience is to depend upon whether or not the auctioneer is a trespasser. I am of opinion that there should be no rule.

The rest of the court concurring,

Rule refused.

Goods in an auctioneer's store are so obviously the property of strangers, that they are not distrainable for the rent of the store. *Himely v. Wyatt*, 1 Bay. 102. Goods of a third person, in the store of one who takes merchandise on storage, cannot be distrained. *Brown v. Sims*,

17 Serg. & Rawle, 138; *Walker v. Johnson*, 4 M'Cord, 552; *Owen v. Boyle*, 4 Shepley, 47; *Cennak v. Hale*, 23 Wend. 462; *Bevan v. Crookes*, 7 Watts & Serg. 416. *Contrà*, *Elford v. Clark*, 2 Brevard, 88.

Ex parte JOHN O'NEILL. Nov. 23.

A warrant of commitment for contempt, under the 9 & 10 Vict. c. 95, s. 99, for non-appearance on a judgment summons, is regular, though issued more than six months after the date of the judge's order,—notwithstanding, that, by the 37th rule of practice of county courts, a warrant is to be current only for two months *after its date*.

On the 24th of February, 1849, a judgment was recovered against John O'Neill, in the Clerkenwell county court of Middlesex, for 9s. 8d. debt, and 4s. 2d. *costs, to be paid at the rate of 3s. every four weeks, commencing with the 14th of March. On the 8th of April [*58 last, a summons was obtained, under the 98th section of the statute 9 & 10 Vict. c. 95, (a) calling upon O'Neill to appear before the judge, to answer certain questions: and, as he neglected to attend on the day appointed (the 19th), the judge, upon proof of the service of the summons, on that day made an order for his commitment, pursuant to s. 99, (b) to the house *of correction, for fourteen days, or until discharged by due course of law. On the 14th of November, instant, [*59

(a) Which enacts "that it shall be lawful for any party who has obtained any unsatisfied judgment or order in any court held by virtue of this act, or under any act repealed by this act, for the payment of any debt or damages, or costs, to obtain a summons from any county-court within the limits of which any other party shall then dwell or carry on his business,—such summons to be in such form as shall be directed by the rules made for regulating the practice of the county-courts as herein provided, and to be served personally upon the person to whom it is directed,—requiring him to appear at such time as shall be directed by the said rules, to answer such things as are named in such summons; and if he shall appear in pursuance of such summons, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which is the subject of the action in which judgment has been obtained against him, and as to the means and expectation he then had, and as to the property and means he still hath, of discharging the said debt or damages or liability, and as to the disposal he may have made of any property; and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiries authorized to be made as aforesaid; and the costs of such summons and of all proceedings thereon shall be deemed costs in the cause."

(b) Which enacts, "that, if the party so summoned shall not attend as required by such summons and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn

O'Neill was arrested upon a warrant issued upon that order, dated the 19th of October.

Skinner, on a former day in this term, moved for a *habeas corpus* to bring up the prisoner to be discharged, on the ground that the warrant was illegal, inasmuch as it appeared to have been issued more than six months after the date of the order. The order was, it may be assumed, properly made: and the warrant was made pursuant to the 102d section, which enacts, "that, whenever any order of commitment shall have been made as aforesaid, the clerk of the said court shall issue, under the seal of the court, a warrant of commitment, directed to one of the bailiffs of any county court, who by such warrant shall be empowered to take the body of the person against whom such order shall be made." The question is, whether the warrant should not be issued immediately, or whether the order may be kept suspended over the party for an indefinite *period. The 37th of the rules framed by the judges under *60] the 78th section of the act, provides that "no warrant of execution or commitment shall be executed after the expiration of two calendar months from the date thereof." [JERVIS, C. J.—This warrant was executed within two months of its date.] But more than six months after the date of the order. [MAULE, J.—You do not show that the prisoner might have been arrested earlier.] Under the 105th section, the judge has a discretion to suspend execution in certain cases. That section enacts, "that, if it shall at any time appear to the satisfaction of the judge, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness, or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action, for such time, and on such terms, as the judge shall think fit, and so from time to time until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased." If this warrant be good, the clerk will have or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by the examination of the party or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether, or by any instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided,—it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days."

a larger discretion than the judge; for, the latter can only suspend the execution under special circumstances. [JERVIS, C. J.—I see no objection to the warrant's remaining a time in the office. WILLIAMS, J.—The clerk is not to issue the warrant until the plaintiff calls upon him to do so.] That must be within the two months provided by the 37th rule.

The prisoner was now brought up on a return to the *habeas*, and a clerk from the office of the county court attended, but no counsel appeared to support the warrant.

**Skinner*, for the prisoner, submitted that the whole object of [61 the county court act being the summary adjustment of small demands, the warrant ought to issue at once, or, at all events, within a reasonable time after the making of the order; more especially as the satisfaction of the debt would not relieve the defendant from the liability to be imprisoned under the warrant, if it could be allowed to stand over in this manner.

JERVIS, C. J.—We granted the writ in this case, not because we entertained any very serious doubt, but because the point was novel, and involved the liberty of the subject. Upon attentively looking at the statute, however, I am of opinion that all that has been done is regular. The order was made on the 19th of April, and directed that the defendant be committed for fourteen days, for not answering, when properly called upon so to do. The circumstance of the order not having been drawn up until a long time afterwards, makes no difference. There is no rule requiring it to be drawn up immediately. The term of imprisonment must commence from the time of the arrest, whenever that may be. For anything that appears, there might have been two or three warrants issued before the warrant in question, but the defendant was not to be met with.

MAULE, J.—I am of the same opinion. It does not appear that the defendant could have been arrested a day earlier than he was taken. It may be convenient that some rule should be framed, as to warrants, analogous to the 37th rule, which has been referred to. Until that is done, however, there is nothing irregular in what has been done here.

WILLIAMS, J.—I am of the same opinion. There being no rule affecting this case, the prisoner must be remanded.

Prisoner remanded.

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*ABLEY v. DALE. Nov. 11.

Held, that a party ordered to pay a sum recovered against him in the county court, who has made default, and, upon being examined upon a judgment summons, shows no sufficient excuse for such default, may be committed to prison forthwith; but that, if the judge orders him to pay the money at a future day, or, in default, to be committed, and the party again makes default, he cannot be committed without being examined as to the cause of such second default.

Plea, to an action by A. against B. for false imprisonment,—that a judgment was recovered by B. against A. in the county court, for a sum ordered to be paid by instalments; that A. was summoned, under s. 98, of the 9 & 10 Vict. c. 95, to show cause why he had not paid the instalments; that he appeared to the summons, and that the judge ordered him to pay the debt and costs on a given day, or, in default, that he should be committed for twenty days; and that he made default, and was thereupon arrested, and carried to gaol, &c. :—Held, bad.

TRESPASS and false imprisonment. The declaration stated that the defendant, on the 20th of August, 1849, with force and arms, assaulted the plaintiff, and seized him, and caused him to be arrested and apprehended, and unlawfully committed to a certain common gaol or prison, called the house of correction for the county of Middlesex, and also there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for a long space of time, to wit, &c., &c.

Plea,—that, before the time when, &c., to wit, on, &c., the now defendant and one George Cornelius Dale levied their plaint in the White-chapel county court of Middlesex, against the now plaintiff, for the recovery of a certain debt, to wit, 13*l.* 3*s.*, then, and within the jurisdiction of the said court, justly due and owing from the now plaintiff to the now defendant and the said George Cornelius Dale; which said court then and thence continually during the times hereinafter in this plea mentioned, was holden within the district of the said court, before JAMES MANNING, one of her Majesty's serjeants-at-law, then, and during all that time, being the judge of the said court; which said court then, and

*63] *during all that time, had jurisdiction to hear and determine the said plaint; and the now plaintiff, who then was liable to be sued in the said court for the said debt, was then, to wit, on the day and year last aforesaid, duly summoned to answer the said plaint: That the now plaintiff, afterwards, and before the said time when, &c., to wit, on the 10th of June, in the year last aforesaid, appeared in the said court so holden as aforesaid, to answer the said plaint; and such proceedings were thereupon had in the said plaint, that afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, the now defendant and the said George Cornelius Dale, by the consideration and judgment of the said court, recovered against the now plaintiff, as well the said debt, amounting to the said sum of 13*l.* 3*s.*, as also the sum of 2*l.* 7*s.* for the costs and charges of the now defendant and the said George Cornelius Dale, by them about their suit in that behalf expended, by the said court then adjudged to them in that behalf,—which said two

several sums of 13*l.* 3*s.* and 2*l.* 7*s.*, amounting in the whole to a large sum, to wit, the sum of 15*l.* 10*s.*, were then ordered by the said court, in due manner, according to the statute in that behalf, to be paid by the now plaintiff to the now defendant and the said George Cornelius Dale, by certain monthly instalments, that is to say, by instalments of 15*s.* every month, the first of such instalments to be paid on the 10th of July then next; such payments to be made at the office of the clerk of the said court; as by the record of the proceedings in the said plaint, still remaining in the said court, more fully appears: That the now plaintiff, on divers days afterwards, and before the issuing of the summons therein-after mentioned, paid divers small sums of money, amounting in the whole to the sum of 2*l.* 7*s.* 4*d.*, and no more, for and towards payment of the said instalments; but that the *now plaintiff made default in payment of the residue of the said instalments, although, at the [*64 time of the issuing of the said summons thereafter mentioned, the whole of the said instalments had become due and payable; and that 12*l.* 12*s.* 8*d.*, parcel of the said sum of 15*l.* 10*s.*, at the time of the issuing of the said summons thereafter mentioned, and of the making of the order, and of the committal thereafter also mentioned, remained and was wholly due and unpaid and unsatisfied to the now defendant and the said George Cornelius Dale: That, the said sum of 12*l.* 12*s.* 8*d.* so remaining due and unpaid, and the said judgment being and remaining unsatisfied, afterwards, and before the said time when, &c., to wit, on the 20th of May, 1849, the now defendant and the said George Cornelius Dale, according to the course and practice and rules of the said court, and the form of the said statute, caused the now plaintiff to be summoned, and the now plaintiff then was summoned, to appear at the said county-court, to wit, at the court-house in Osborn Street, White-chapel, on the 31st of May, 1849, to answer such questions as should be put to him touching his, the plaintiff's, estate and effects, and the manner and circumstances under which he, the now plaintiff, contracted the said debt which was the subject of the suit in which the said judgment was so obtained as aforesaid, and as to the means and expectations which the now plaintiff had at the time he contracted the said debt, and as to the property and means he then still had of discharging the said debt, and as to the disposal he might have made of any property: That the said several things touching which the now plaintiff was so summoned to answer such questions as should be put to him, were named in the said summons; and that the said summons, to wit, on the said 20th of May, in the year last aforesaid, was in due manner served upon the now plaintiff personally, he, *the now plaintiff, then dwelling within the limits of the said [*65 court: That afterwards, and before the said time when, &c., to wit, on the said 31st of May, 1849, at the said county court, before the said judge, the now plaintiff appeared in answer to the said summons,

pursuant to the exigency thereof, and was then examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt, and as to the means and expectations which he had at the time of the contracting of the said debt, and as to the property and means he then still had of defraying the said debt, and as to the disposal he might have made of any property; and that thereupon it then appeared, to the satisfaction of the said judge of the said court, and it was then adjudged by the said court, upon the said examination, that the now plaintiff had sufficient means and ability of discharging the said sum of 12*l.* 12*s.* 8*d.* when the same became due under the said order, and that he still had sufficient means and ability of discharging the same; That it was thereupon then, at the said court, adjudged and ordered by the said court, that the now plaintiff should pay the said sum of 12*l.* 12*s.* 8*d.*, together with 1*l.* 13*s.* 8*d.* for the costs of the last-mentioned summons and the proceedings thereon, according to the statute in that behalf, amounting in the whole to the sum of 14*l.* 6*s.* 4*d.*, by instalments of 10*s.* in every month, the first instalment to be paid on the 2d of July then next,—or that the now plaintiff be committed, for the term of twenty days, to the house of correction for the county of Middlesex, in Cold Bath Fields, in the said county, according to the form of the statute in such case made and provided, or until he should be discharged by due course of law; as by the last-mentioned order, remaining in the said court, reference being thereto had, would fully appear: That after-
*66] wards, and before the said time when, &c., in *the declaration mentioned, to wit, on the 2d of August, in the year last aforesaid, two of the last-mentioned instalments became due and in arrear, but the now plaintiff wholly neglected and refused to pay the same, or any part thereof; and that thereupon the said sum of 14*l.* 6*s.* 4*d.*, and every part thereof, still remained wholly due and unpaid: That afterwards, and before the said time when, &c., to wit, on the 17th of August, in the year aforesaid, the now defendant and the said George Cornelius Dale caused to be sued and prosecuted out of the said county court, then holden before the said judge, within the district for the said court, and there was then in due form of law issued by the said court, according to the form of the statute in such case made and provided, a certain warrant in writing, under the seal of the said court, and bearing date the day and year last aforesaid, and directed to the high-bailiffs and other bailiffs of the said court, and all constables and peace-officers within the jurisdiction of the said court, and to the governor of the house of correction aforesaid, whereby, after reciting the premises thereinbefore mentioned, the said high-bailiffs, bailiffs, and constables, and peace-officers, were required to take the now plaintiff, and to deliver him to the governor of the said house of correction, and the said governor was thereby required to receive the now plaintiff, and him safely keep in the said house of correction for the term of twenty days from the arrest

under that warrant, or until he should be sooner discharged by due course of law; which said warrant, afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, was delivered to Nathaniel Sykes, then being one of the bailiffs of the said court, to be executed in due form of law; by virtue of which said warrant he the said Nathaniel Sykes, so being such bailiff as aforesaid, afterwards, to wit, on the 20th of August, in the year last aforesaid, *within the jurisdiction of the said court, in execution of the said warrant, [67 gently laid his hand upon the now plaintiff, in order to arrest him for the cause aforesaid, and did then and there arrest him for the cause aforesaid, and did then and there deliver him to the said governor of the said house of correction, who did keep and detain the now plaintiff in custody under the said warrant, for the space of twenty days from the said arrest; which were the same alleged trespasses whereof the plaintiff had above complained against the defendant,—verification.

To this plea, the plaintiff demurred specially,—assigning for cause (amongst others) that the commitment on the order to pay the residue of the debt by instalments, as alleged in the plea, was bad, inasmuch as, the original judgment having been varied, the plaintiff ought to have been summoned again touching his neglect to comply with the second order, and because he had no opportunity, before the committal, of proving that he had paid the instalments, or showing an excuse or release.

Lush, in support of the demurrer.—The plea seeks to justify the imprisonment of the defendant under an order of the Whitechapel county court: the substantial objection to it, is, that the judge had no power to make that order. The point was expressly determined in *Ex parte Kinning*, 4 Com. B. (507 E. C. L. R. vol. 56), upon the London act, 8 & 9 Vict. c. 127, s. 1, in which case it was held, that, where the judge has, upon proof of the ability of the debtor, made an order *simpliciter* for the payment of the debt by instalments, he cannot, after default made, grant a warrant of imprisonment, without giving the debtor an opportunity of being heard against the granting of such [68 *warrant. The only difference between the order in that case and the present is, that there the order did not go on to say, in the alternative, that, unless the instalments were duly paid, the debtor should be committed. But that makes no real distinction. [*JERVIS*, C. J.—In that case the judge of the county court decided that the money had not been paid: here, the gaoler decides.] *CRESSWELL*, J., there says: (a) “It is not necessary to say whether or not the judge has power, in the commencement, to direct the debtor to be imprisoned, upon his failure to obey the order. Strong arguments would readily suggest themselves against the validity of such a form of order. It is enough, however, to say that he has not done so here. I think it is impossible to say that

(a) 4 Com. B. 528 (E. C. L. R. vol. 56).

the judge was not doing a judicial act; and therefore the debtor had a right to be present." The same doctrine was upheld in *Kinning v. Buchanan*, 8 Com. B. 271 (E. C. L. R. vol. 65). [MAULE, J.—The substance of the objection is, that a man shall not be subjected to punishment without being heard,—according to the doctrine in *Dr. Bentley's case*.(a)]

Hugh Hill, contra.—The case of *Ex parte Kinning* is altogether different from the present case. There, the debtor was only once before the court, viz., at the hearing of the cause, when the judge ordered that he should pay certain sums on given days, or that, in default, he should stand committed. There was no subsequent summons or order. Whereas, here, the party, after having made default, was summoned pursuant to *69] s. 98,(b) and the summons was heard in his presence, *and an order made under s. 99,(b) for payment by instalments, with an alternative that he be committed for default. The power of the judge is extremely comprehensive. By s. 100, it is enacted, "that it shall be lawful for the judge of any court before whom such summons shall be heard, if he shall think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him for the payment, by instalments or otherwise, of any debt or damages, and to make any further or other order, either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner as such judge may think reasonable and just." [MAULE, J.—The ground of the decision in *Ex parte Kinning* was, that, it might be that circumstances had occurred since the hearing which, if brought before the judge, might induce him to forbear from committing the debtor. No doubt it was competent to the judge to commit the party forthwith. But he did not do so: and the debtor had a right to be heard before the order for his commitment took place.] The judge, having power to commit, orders his commitment, but gives him the alternative of paying. The act must receive a reasonable construction. Assuming that the judge of the county court exceeded his jurisdiction, is the suitor responsible? [JERVIS, C. J.—*Kinning v. Buchanan* decides that.] There is nothing unusual or unreasonable in proceedings being taken *ex parte*. Under the tithe-commutation act, 6 & 7 W. 4, c. 71, s. 82, it is provided that, where the half-yearly payment of rent-charge on land shall be in arrear and unpaid for the space of forty days, and there shall be no sufficient distress upon the *70] *premises liable to the payment thereof, it shall be lawful for any judge of Her Majesty's courts of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff, requiring

(a) *The King v. The Chancellor, &c., of Cambridge*, 1 Stra. 557, Andr. 176, 2 Ld. Raym. 1334, 8 Mod. 143, Fort. 202.

(b) See the section, ante, p. 58.

him to summon a jury to assess the arrears of the rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of the superior courts, &c.: upon the construction of this statute, it was held, per POLLOCK, C. B., ALDERSON, B., and PLATT, B.,—*dissentiente* PARKE, B.,—that such order might be made on an *ex parte* application to the judge: In re Hammersmith Rent-charge, 4 Exch. 87.† [MAULE, J.—That was a case of civil process. Where punishment is discretionary, it is essential that the judge should have all the circumstances of the case brought under his notice at the time of awarding the punishment. Can the judge be allowed to say that the punishment shall be certain and entire, notwithstanding the party may have a reasonable excuse for his default? Is such an order to be enforced against a man who has paid all except a very small instalment?] The statute does not, in terms, seem to contemplate a second judgment summons.

Lush, in reply, was not called upon.

JERVIS, C. J.—It seems to me that we are bound in this case by the authority of *Ex parte Kinning and Kinning v. Buchanan*. It is true, that, in *Ex parte Kinning*, the warrant was not in terms the same as the warrant here: but that case proceeds upon the broad principle of natural justice, that a man shall not be committed before he has had an opportunity of being heard. The 98th section of the 9 & 10 Vict. c. 95, enables a party who has obtained a judgment in the *county-court, to summon his debtor to answer certain matters: and the [*71 99th section gives the judge power in seven different cases to commit the person so summoned; the seventh is—"if it shall appear to the satisfaction of the judge of the said court, that the party summoned has then, or has had since the judgment obtained against him, sufficient means or ability to pay the debt or damages or costs so recovered against him, either altogether or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same, as shall have been so ordered or as shall be ordered pursuant to the power hereinafter provided." If the debtor, at the time he is before the judge, has refused or neglected to pay, the power of the judge to commit him attaches. That is consistent with the general rule of law; and there is no necessity for straining the words of the act, to give him any further power. It may have become impossible for the debtor, by reason of circumstances beyond his control, and which he ought to have had an opportunity to explain,—to obey the former order. For these reasons, I am of opinion that our judgment ought to be for the plaintiff.

MAULE, J.—I agree in the opinion expressed by the lord chief justice. I do not think it necessary to repeat the grounds of that opinion. The observations thrown out by me in the course of the argument would, no doubt, have been answered, if they had been susceptible of an answer. Our decision rests upon the general ground, which is a most important

one to sustain. "The laws of God and man," says Mr. Justice FORESCUE, in Dr. Bentley's case, "both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed *72] by a very learned *man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam (says God), where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."

WILLIAMS, J.—I am of the same opinion. Although I did not take any part in the decision of the case of *Ex parte* Kinning, I entirely concur in the grounds upon which this court there rested its judgment. I think this plea cannot be held to afford any defence, without abandoning those general and important principles upon which that case proceeded.

TALFOURD, J.—I am of the same opinion. When an order like this, made for the payment of moneys at future times, it must be subject to those contingencies which vary all human affairs. It is important that the broad general principle upon which this court acted in *Ex parte* Kinning should not be departed from.

Judgment for the plaintiff.(a)

(a) Vide note C., at the end of this volume.

GRAY v. COOMBES. Nov. 11.

The omission of a letter in the name of a party in the title of an affidavit, the word remaining *idem sonans*, is no ground for discharging a rule obtained upon such affidavit.

THE *venue* in this case, which had originally been laid in Middlesex, was removed to Hampshire, at the instance of the defendant, upon the ordinary affidavit.

Simon now moved to discharge that rule, and to restore the *venue* to *73] Middlesex, upon the ground that the *rule to change it was obtained upon an affidavit not intituled in the proper cause, the title of the affidavit being "*Gray v. Coombes*." [MAULE, J.—Have you any authority to show that the omission of an *e* mute in the name of a party, vitiates an affidavit?] There certainly is no authority to that precise point.

MAULE, J.—Then there can be no rule.

Rule refused.

COURTENAY v. EARLE. Nov. 18.

Counts alleging a promise to pay money upon a good consideration, unconnected with any common law duty, and alleging for breach, nonpayment,—are counts in assumpsit; and cannot properly be joined with counts in case.

THE first count of the declaration stated, that, before and at the time of the committing of the several grievances thereafter mentioned, the defendant and one Horatio Hammick carried on business in copartnership under and by the name, style, and firm of Hammick & Earle; that, on the 22d of May, 1848, the plaintiff accepted and delivered to the said Hammick & Earle, at their request, a certain bill of exchange for 161*l.* 13*s.*, drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after the date thereof; that, before the said bill became due, to wit, on the 14th of August, 1848, the plaintiff accepted, and delivered to the said Hammick & Earle, at their request, who then took and received of and from the plaintiff, a certain other bill of exchange for the sum of 94*l.* 10*s.*, drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after date, for and on account of so much of the said sum of 161*l.* 13*s.*, and which last-mentioned bill was duly paid by the plaintiff when the same became due; that the plaintiff, to wit, on the day and in the *year aforesaid, and before the said bill for 161*l.* 13*s.* became due, [*74 paid to the said Hammick & Earle, who then accepted and received of and from the plaintiff, a certain large sum of money, to wit, the sum of 45*l.*, for and on account of the residue of the said bill and sum of 161*l.* 13*s.*; and that *thereupon it became and was the duty* of the defendant to indemnify the plaintiff, and to provide for, pay, and discharge the said bill for 161*l.* 13*s.*, to the extent and amount of the said two sums of 94*l.* 10*s.* and 45*l.* respectively: Breach, that the defendant neglected to indemnify the plaintiff, and that, by reason thereof, an action was brought against the plaintiff by the holders of the bill for 161*l.* 13*s.*, and he was compelled to pay the amount, with costs.

The third count stated, that, before the said bill so accepted by the plaintiff for 94*l.* 10*s.* became due, to wit, on the 27th of October, 1848, the plaintiff, at the request of the defendant and of the said Hammick & Earle, and for their accommodation, and without any valuable consideration other than thereafter next mentioned, accepted a certain other bill for the sum of 95*l.* 10*s.* 6*d.*, payable to the order of the said Hammick & Earle, three months after date thereof; *that, in consideration of such acceptance, the defendant then undertook and agreed with the plaintiff to provide a certain sum*, to wit, 50*l.*, in part payment of the said acceptance for the said sum of 94*l.* 10*s.*, at the time when the same became due; nevertheless, the defendant, disregarding his duty in that behalf, did not nor would, nor did nor would the said Hammick &

Earle, provide the said sum of 50*l.*, or any other sum or sums, in such part payment as aforesaid, but, on the contrary thereof, wholly neglected and refused so to do, although the plaintiff, *on the faith of the said undertaking to provide the said sum of 50*l.**, delivered to the defendant the said acceptance for the said sum of 95*l.* 10*s.* 6*d.*; yet that the defendant *did not nor would, nor did nor would the said Hammick & Earle, return or deliver up the said acceptance for the said sum of 95*l.* 10*s.* 6*d.*, or provide for or pay the same when the same became due; whereby the plaintiff lost the said sum of 50*l.*, and was compelled to pay the said amount of the said bill for 95*l.* 10*s.* 6*d.*, to wit, to one J. S., the holder thereof, who sued the plaintiff, &c.

The fourth count stated, that, at the time of the writing by the defendant, and receiving by the plaintiff, of the letter thereafter mentioned, and before and at the time of the committing of the grievances thereafter mentioned, to wit, on the 18th of February, 1849, the defendant and plaintiff had divers dealings and transactions together, and there were then outstanding in the hands of one J. S., who was then the holder thereof, two bills of exchange drawn by the defendant and Hammick, under the name, style, and firm of Hammick & Earle, upon, and accepted by the plaintiff, that is to say, a bill of the 22d of May, 1848, for 161*l.* 13*s.*, payable to the order of Hammick & Earle, three months after date, and also a bill of the 27th of October, 1848, for 95*l.* 10*s.* 6*d.*, at three months; that thereupon the defendant, before the committing of the grievances thereafter mentioned, to wit, on the 18th of February, 1849, wrote and sent to the plaintiff a certain letter and proposal, in the words and figures following, that is to say,—“196, Piccadilly. Feb. 13, 1849. Dear Sir (meaning the plaintiff),—I (meaning thereby the defendant) called on you to-day, &c. My *proposal* is, that you shall give us a check for 41*l.* 12*s.* 4*d.*, and two bills for the remaining 100*l.*, one at three, and the other at four months, or, if it should be inconvenient, your check can be dated a week hence. *If you assent to this, I will engage to get you back the two bills J. S. now holds* (meaning the said bills for 161*l.* 13*s.* and 95*l.* 10*s.* 6*d.*), or, failing that, to return you the two bills I contemplate drawing on you. HENRY EARLE.” That thereupon the plaintiff afterwards, *and before the committing of the grievances, &c., to wit, on the 18th of March, 1849, wrote and delivered to the defendant a check for the sum of 24*l.* 8*s.* 4*d.* on Messrs. Hoare & Co., bankers, and then proposed to the defendant to reduce the sum of 41*l.* 12*s.* 4*d.*, in the said letter of the defendant mentioned, to the sum of 24*l.* 8*s.* 4*d.*, and that the defendant should accept the said sum of 24*l.* 8*s.* 4*d.* instead of the proposed sum of 41*l.* 12*s.* 4*d.*, and on the terms of the said letter of the defendant; that the plaintiff also sent and delivered to the defendant two bills of exchange for the remaining 100*l.* in the said letter mentioned, according to the intent of the said letter, drawn by the defendant and Hammick under the name, style, and firm of Hammick &

Earle, upon, and accepted by, the plaintiff, for 50*l.* 3*s.* 6*d.* and 50*l.* 4*s.* 6*d.*, at three and four months respectively, payable to the order of Ham-mick & Earle; that the defendant thereupon received the check and its amount from Messrs. Hoare & Co., and then consented to the said proposal, and accepted the said check and its proceeds instead of the said sum of 41*l.* 12*s.* 4*d.*, and also accepted the said two bills for the remaining 100*l.* upon the terms and conditions in the said letter and proposal of the defendant, and not otherwise; that *it thereupon became and was the duty of the defendant to get back and return and deliver up to the plaintiff the two bills so held by the said J. S., or to return to the plaintiff the two bills which the defendant so contemplated drawing*, and which were so in fact drawn on the plaintiff, and accepted by him and delivered to the defendant as aforesaid; yet that the defendant, *disregarding his duty in that behalf*, and although a reasonable time in that behalf had elapsed before the commencement of the suit, and though often requested by the plaintiff so to do, did not nor would get back for the plaintiff the two bills so held by J. S., or either of them, but wholly failed to get back the same, or return or deliver up the **same*, or either of them, to the plaintiff, and neglected to return to the plaintiff the [*77 said two bills, or either of them, which the defendant contemplated drawing, &c., to wit, the two bills for 50*l.* 3*s.* 6*d.* and 50*l.* 4*s.* 6*d.* respectively, and permitted the said bill for 95*l.* 10*s.* 6*d.*, to remain outstanding in the hands of J. S., contrary to his duty in that behalf, and also permitted the said bill for 161*l.* 13*s.* to remain outstanding in the hands of P. L. as the holder thereof, and did not return any of the said bills to the plaintiff; whereby the plaintiff was compelled to pay the said two bills, together with costs, to the holders thereof.

The declaration also contained a count in *trover*.

To this declaration the defendant demurred generally.

Willes, in support of the demurrer.—The plaintiff in his declaration has improperly joined counts on promises with counts in tort. [WILLIAMS, J.—Since the decision of the Exchequer Chamber in *Boorman v. Brown*, 3 Q. B. 511 (E. C. L. R. vol. 43), 2 Gale & D. 793, it has been supposed that every action for a breach of contract may be considered as an action of tort.] The judgment in that case by no means warrants that conclusion. The court there did not intend to overrule the case of *Corbett v. Packington*, 6 B. & C. 268 (E. C. L. R. vol. 13), 9 D. & R. 258 (E. C. L. R. vol. 22). In the last-mentioned case, in a declaration in case, one count stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, &c., to be taken care of by the defendant for the plaintiff, for reward to him the defendant, and that, in consideration thereof, the defendant undertook and then and there *agreed* with the plaintiff, to take care of the boars, &c., and to *re-deliver* the same on request: and it was held, upon motion in arrest of judgment, that this was a count in *assumpsit*,

and could not be joined with counts in case. BAYLEY, J., there says :
 *78] "It has been *properly conceded that counts in tort and assumpsit cannot be joined : it is therefore material to see whether this second count be framed in the one or the other form. It has been argued that it cannot be in assumpsit, because the word *promise* does not occur, and because it merely states that duty in the defendant which the law would impose without a promise. In the case of *Lea v. Welch*, 2 Lord Raym. 1516, 2 Stra. 793, it was held that a count was not good in assumpsit, no promise being laid ; but, in that case, it was not stated that the defendant either agreed or undertook. Here, both those words occur ; and the case of *Mountford v. Horton*, 2 N. R. 62, which I think a sensible decision, goes the whole length of proving that these words import a promise. The count is, therefore, in form in assumpsit." So, here, the third and fourth counts are clearly counts in assumpsit.

Needham, contra.—It must be conceded that the third and fourth counts here are founded upon the contract between the parties : and the sole question will be, whether the duty implied by law, to perform the contract, is not one the breach of which may be made the subject of a count in tort. There are many cases in which the plaintiff has an election to sue in assumpsit or tort. [MAULE, J.—I think you must, to support your argument, go the length of saying that tort may be maintained against a man for the breach of his duty to pay his debts.] In *Boorman v. Brown*, a declaration in case stated that the defendant was an oil-broker, and that the plaintiffs, linseed-crushers, retained him as such broker, to sell and deliver for them thirty tuns of linseed-oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to the defendant in that behalf, which retainer he accepted ; that he, as such broker, in pursuance of
 *79] *the retainer, made a contract between the plaintiffs and P., by which the plaintiffs sold to P., and he bought of them, the thirty tuns, at the price, &c., to be delivered by parcels at a place and times named in the declaration, each parcel to be paid for in ready money ; that the plaintiffs consigned two of the parcels to the defendant, and he delivered them to P., on payment ; and that, after the making of the contract, and in pursuance thereof, and of the retainer, the plaintiffs consigned to the defendant, as such broker, the residue of the thirty tuns, to be delivered by him to P., on payment ; that the oil arrived, &c., of which the defendant had notice, and took upon himself the delivery according to the contract ; and that thereupon it became and was the defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P., or any other person, without the price being paid to the plaintiff, according to the contract ; yet that the defendant, not regarding such duty, did not use reasonable care, &c., that the oil should not be delivered, &c., without the price being paid, but neglected and refused so to do, and so negligently and carelessly

behaved in the premises, that, by the defendant's mere carelessness and negligence, the last-mentioned oil was delivered to H. & Co. without the price being paid by P. or any person to the defendant; and that, by reason thereof, and of P. having become bankrupt and unable to pay, the plaintiffs lost the said oil, and the price thereof, &c. The court of Queen's Bench arrested the judgment,—Lord DENMAN saying: "The argument brought under our review the whole doctrine relating to the different forms of action, in tort and in contract. But it is unnecessary for us to consider how that doctrine ought to be applied generally, because we find this declaration defective in an essential point, even supposing that an action on the case may be a proper remedy under such circumstances as are disclosed; for, it must be founded *on the [80 violation of some duty: but, here the duty described is, that of keeping the goods consigned till they were paid for, and is asserted as resulting solely from the defendant's character as broker. Now, the character of a broker is well known to the law: his duties are defined by statutes and by common law, and certainly embrace none to the effect here assumed. The objection is not answered by saying that the acceptance and the terms of it are fully set forth, independently of the averment of the defendant's duty as a broker. That statement is but an introductory narrative; and the declaration carefully abstains from charging that the duty resulted from those facts, by confining it to the duty of a broker. Therefore, no breach of duty is alleged; and no ground of complaint appears on the record." The court of error, however, reversed that judgment, TINDAL, C. J.,—by whom the judgment of the court was delivered,—saying:(a) "The defendant makes two objections to the plaintiff's right to recover in this action,—first, that the action is brought for a nonfeasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, not an action of tort;—and, secondly, that the duty stated in the declaration does not arise from the facts therein alleged. That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort, is not disputed." And, after adverting to the instances of actions against attorneys, surgeons, carriers, and others, and citing *Coggs v. Bernard*, 1 Salk. 26, 3 Salk. 11, 268, 2 Ld. Raym. 909, 1 Com. Rep. 133, Lord Holt, 13, 131, 528, and *Marzetti v. Williams*, 1 B. & Ad. 415 (E. C. L. R. vol. 20), his lordship proceeds: "The principle in all these cases would *seem to be, that the contract creates a duty, and the neglect to [81 perform that duty, or the non-feasance, is a ground of action upon a tort. As to the second objection, we cannot but think the duty upon the breach of which this action is founded, arises by necessary inference

(a) 3 Q. B. 525 (E. C. L. R. vol. 43), 2 Gale & D. 301.

from the terms of the contract between the plaintiffs and the defendant, as set forth in the declaration. The defendant is there stated to have been retained by the plaintiffs as their broker to sell certain goods, and to deliver the same, according to the terms of the contract, to such person as should become the purchaser; and the declaration then proceeds to allege that the defendant, as such broker, made a certain contract between the plaintiffs and one Peacock, whereby he sold to Peacock, and Peacock purchased of the plaintiffs, the oil therein mentioned, at certain times of delivery, *the amount of each parcel to be paid for from delivery in ready money*; and, coupling together the terms of the particular contract made by the defendant, with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold, on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration." [JERVIS, G. J.—All the instances cited there, are instances of common law duties.] When the case of *Boorman v. Brown* came before the House of Lords,^(a) Lord CAMPBELL said:^(b) "Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is *a breach of a duty in the course of that employment, *82] the plaintiff may either recover in tort or in contract." In *Comyns's Digest, Action upon the Case for Negligence*, (A. 4), it is said, that, "if a man neglect to do that which he has undertaken to do, an action upon the case lies: as, if any one, who is not a common carrier, undertake to carry goods, and deliver them at such a place; if he does not carry them, an action upon the case lies." For this he cited *Rogers v. Head*, Cro. Jac. 262.^(c) [MAULE, J.—That was an action of assumpsit.] Mr. Serjt. Stephen, in his treatise on Pleading, 5th ed. p. 18, ranks assumpsit as an action upon the case. [MAULE, J.—Not for all purposes: not, for instance, for the joinder of counts.] In *Govett v. Radnidge*, 3 East, 62, Lord ELLENBOROUGH asks—"What inconvenience is there in suffering the party to allege his *gravamen*, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire? By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner as either to join a count in trover therewith, if he have another cause of action for the consideration of the court, other than the action of assumpsit, or to join with the

(a) *Brown v. Boorman*, 11 Clark & Fin. 1.

(b) 11 Clark & Fin. 44.

(c) And see *Robinson v. Dunmore*, 2 B. & P. 416.

assumpsit the common counts, if he have another cause of action to which they are applicable." [JERVIS, C. J.—The duty alleged is exactly co-extensive with the promise.] It is so.

* *Willes*, in reply.—In *Boorman v. Brown*, the contract was a contract arising out of the defendant's employment as broker; [*83 whereas, here, the promise is a bare promise to do something, upon the plaintiff's doing something else; and,—assuming that the duty alleged corresponds exactly with the promise set out,—the third and fourth counts disclose no duty beyond that arising from the promise.

JERVIS, C. J.—I am of opinion that the defendant in this case is entitled to the judgment of the court. If the case of *Boorman v. Brown* were an authority to the full extent to which it has been pressed by Mr. *Needham*, no doubt the third and fourth counts here might well be joined with counts in tort. But, upon examination, that case will be found to proceed upon this principle,—that, where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. And, if that be so, the case is reconcilable with the other cases with which it has been supposed to conflict. Before that case, it had been supposed, upon the authority of *Corbett v. Packington*, that the violation of a bare promise, without any such general duty, might be the subject of an action of tort. That clearly is not so. Without altogether destroying the well-known distinction between actions of contract and actions of tort, I think we cannot hold the counts in this declaration to be well joined.

MAULE, J.—I also am of opinion that the defendant is entitled to our judgment. In the case of *Boorman v. Brown*, no doubt was suggested that there might not be *counts in case and counts in assumpsit that could not be joined. Lord CAMPBELL, when that case was [*84 before the House of Lords, asked the counsel for the plaintiff in error, whether, if the money counts had been added, there might not have been a demurrer for misjoinder: and it was admitted that there might. (a) If there can be such a thing as a misjoinder of counts in case and assumpsit, I think it exists here. That there are counts in case here, is clear: the last is *trover*. Then, there are counts which allege that the defendant promised to pay money, in consideration of something which would be a good consideration in point of law for that promise. That is substantially the same as a promise to pay money in consideration of a sale and delivery of goods. No modern authority that I am aware of has said that such counts can be joined. Formerly, they undoubtedly could not: and the later cases have not said that they can. The case of *Brown v. Boorman*, in the House of Lords, professes, and was understood, to decide that there may be a case in which there may be a mis-

joinder of counts in case and assumpsit. And I am of opinion that this case is an instance of it.

V. WILLIAMS, J.—I am of the same opinion. I think it is impossible to uphold this declaration, without saying that counts in case and counts in assumpsit may be joined. That is directly at variance with *Boorman v. Brown*.

TALFOURD, J., concurred.

Judgment for the defendant.

Counts in tort and contract cannot be joined in the same declaration. *Wilson v. Marsh*, 1 Johns. 503; *Church v. Mumford*, 11 Johns. 480; *Clinton v. Hopkins*, 2 Root, 225; *Stoyel v. Westcott*, 2 Day, 418; *Byle v. Howlett*, 3 Bibb, 347; *Wickliffe v. Sanders*, 6 Monroe, 298; *Wickliffe v. Davis*, 2 J. J. Marshall, 70; *Traudle v. Arnold*, 7 Ibid. 407; *Carstarphen v. Graves*, 1 A. K. Marshall, 435; *Sayers v. Scudder*, 1 Penn. 53; *Broadwell v. Congar*, Ibid. 137; *Van Pelt v. Van Pelt*, 2 Penn. 619; *Bishop v. Jones*, 2 Ibid. 1041; *Creel v. Brown*, 1 Robinson, 265; *Rodley v. Roop*, 6 Blackford, 158; *Ethison v. Post*, 5 Ibid. 140; *Tucker v. Gordon*, 2 Brevard, 136. A count upon a promise to pay the plaintiff a sum of money "if and when the defendant should recover his demand against A.," al-

leging that the defendant, intending to wrong the plaintiff, never attempted to recover said demand, cannot be joined with a count in assumpsit on the promise. *White v. Snell*, 5 Pick. 425, 8 C. 9 Pick. 16. Where in two counts the gravamen set forth was in both a tortious breach of the defendant's duty as an attorney, as well as of the implied promise arising from his being employed, the counts were held to be well joined, as each contained allegations sufficient to support it either in tort or assumpsit. *Church v. Mumford*, 11 Johns. 479. A count for the loss of a horse, put under the care of the defendant as an innkeeper, cannot be joined with a count in assumpsit. *Holland v. Paok*, Peck, 15.

See, however, *Jones v. Conoway*, 4 Yeates, 109; *Hallock v. Powell*, 2 Caines, 216.

*85] *T. G. PHILLPOTTS v. J. PHILLPOTTS and F. R. PHILLPOTTS, Executor and Executrix of T. G. PHILLPOTTS, deceased. Nov. 23.

In covenant upon an annuity deed,—Held that the defendants (executors) were estopped from pleading that the deed was made fraudulently and collusively between the testator and the plaintiff, for the purpose of multiplying voices, and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by the indenture.

Under the statutes 7 & 8 W. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1, a fraudulent conveyance made for the mere purpose of conferring a vote, is void only to the extent of preventing the right of voting from being acquired, but is valid and effectual, as between the parties, to pass the interest.

THIS was an action of covenant brought by the plaintiff against the defendants, executor and executrix of the last will and testament of T. G. Phillpotts, deceased, for arrears of four several annuities granted by an indenture dated the 29th of January, 1841, by the testator to the plaintiff.

The indenture, as set out on oyer by the defendants, was as follows:—This indenture, made the 29th of January, 1841, between Thomas Griffin Phillpotts the elder, of the town of Monmouth, in the county of Monmouth, Esq., of the one part, and Thomas Griffin Phillpotts the younger, of the town of Newport, in the county of Monmouth, gentleman (eldest son of the said T. G. Phillpotts the elder), of the other

part,—witnesseth, that the said T. G. Phillpotts the elder, for and in consideration of the natural love and affection which he hath and beareth to his son, the said T. G. Phillpotts the younger, also in consideration of the sum of 5s. of lawful money of Great Britain to the said T. G. Phillpotts the elder in hand well and truly paid by the said T. G. Phillpotts the younger, at or before the execution of these presents,—the receipt whereof is hereby acknowledged,—hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one annuity or clear yearly rent-charge or sum of 3*l*., of lawful money of *Great Britain, to be charged [*86 and chargeable upon, and issuing and payable out of all that messuage, smith's shop, garden and orchard, lands, hereditaments, and premises, with the appurtenances, and situate, lying, and being in the parish of Dingeston, in the county of Monmouth, and for many years past in the occupation of Isaac Pritchard, as tenant thereof; to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*., unto and by the said T. G. Phillpotts the younger, and his assigns, for and during the term of the natural life of him the said T. G. Phillpotts the younger,—the said annuity to be paid and payable by two half-yearly payments, on the 24th of June and the 25th of December in every year, without any deduction out of the same, or any part thereof; the first payment of the said annuity or clear yearly rent-charge or sum of 3*l*. to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living: And this indenture further witnesseth that the said T. G. Phillpotts the elder, for the consideration aforesaid, and also in consideration of a further sum of 5s. of lawful money of Great Britain to him in hand well and truly paid by the said T. G. Phillpotts the younger, at or before the execution of these presents,—the receipt whereof is hereby acknowledged,—hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one other annuity or clear yearly rent-charge or sum of 3*l*. of like lawful money of Great Britain, to be charged and chargeable upon, and issuing and payable out of all that messuage, tenement, or dwelling-house, and buildings, garden, and premises, with the appurtenances, situate, lying, and being on the right-hand side of the road leading from Whitchurch to the Washings and the river Wye, in the parish of Whitchurch, in the county *of Hereford, now and for many years past in the occupation of [*87 William James, as tenant thereof, and out of and upon their and every of their appurtenances; to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*. unto and by the said T. G. Phillpotts the younger, and his assigns, for and during the term of the natural life of him the said T. G. Phillpotts the younger,—the said annuity or clear yearly rent-charge to be paid and payable, by two even half-yearly payments, on the 24th of June and the 25th of Decem-

ber, in every year, without any deduction out of the same or any part thereof,—the first payment of the said annuity or clear yearly rent charge or sum of 3*l*. to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living: And this indenture also further witnesseth that the said T. G. Phillpotts the elder, for the consideration aforesaid, and also in consideration of the further sum of 5*s*. of like lawful money of Great Britain to him in hand well and truly paid by the said T. G. Phillpotts the younger, at or before the execution of these presents,—the receipt whereof is hereby acknowledged,—hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one other annuity or yearly rent-charge or sum of 3*l*. of like lawful money of Great Britain, to be charged and chargeable upon, and issuing and payable out of, all those the great and small tithes of the parish of Llanthew, in the county of Brecon; and also out of the glebe land thereto belonging and appertaining, and situate, lying, and being in the parish of Llanthew aforesaid,—to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*. unto and by the said T. G. Phillpotts the younger, and his assigns, for and *88] during the lives of the said T. G. *Phillpotts the elder, Ann Stokes, of Hen Castle, in the county of Pembroke, widow of the late Thomas Stokes, and Francis Collins, of Swansea, in the county of Glamorgan, and the lives and life of the survivor or survivors of them; the said annuity or clear yearly rent-charge to be paid and payable, by two equal half-yearly payments, on the 24th of June and the 25th of December, in every year, without any deduction out of the same: And this indenture lastly witnesseth that the said T. G. Phillpotts the elder, for the consideration aforesaid, and also in consideration of a further sum of 5*s*. of like lawful money of Great Britain to him in hand well and truly paid by the said T. G. Phillpotts the younger, at or before the execution of these presents,—the receipt whereof is hereby acknowledged,—hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one other annuity or clear yearly rent-charge or sum of 3*l*. of like lawful money of Great Britain, to be charged and chargeable upon, and issuing and payable out of, all that messuage, tenement, or dwelling-house, out-house, building, garden, lands, and premises, situate, lying, and being adjoining the road leading from Hewelsfield to Brockwear, in Brockwear Common, in the parish of Hewelsfield, in the county of Gloucester, late in the occupation of Richard Aston, but now of John Kethro, as tenant thereof, and out of and upon them and every of them, and every of their appurtenances; to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*. unto and by the said Thomas G. Phillpotts the younger, and his

assigns, for and during the natural life of the said T. G. Phillpotts the younger, and the said annuity or clear yearly rent-charge to be paid and payable, by two even half-yearly payments, on the 24th of June, and the 25th of December, in every year, without any deductions out *of the same, or any part thereof; the first payment of the said [*89 annuity or clear yearly rent-charge or sum of 3*l*. to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living: And the said T. G. Phillpotts the elder, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree to and with the said T. G. Phillpotts the younger, and his assigns, by these presents, in manner following, that is to say, that, if the said annuity or clear yearly rent-charge or sum of 3*l*., or any part thereof, which is hereby charged and made payable on the premises mentioned to be situate in the said parish of Dingeston, in the county of Monmouth aforesaid, or the said annuity or clear yearly rent-charge or sum of 3*l*., or any part thereof, which is hereby charged or made payable on the premises mentioned to be situate in the parish of Hewelsfield, in the county of Gloucester aforesaid, or either of them, shall be in arrear and unpaid by the space of twenty-one days next after any of the said days or times whereon the same ought to be respectively paid as aforesaid, and in either of such cases, as often as the same shall respectively happen, it shall and may be lawful for the said T. G. Phillpotts the younger, or his assigns, to enter into and upon all or any of the said messuages, hereditaments, great and small tithes, glebe lands, and premises, hereinbefore charged with the said several annuities or yearly rents or sums of 3*l*. each, and to distrain for the said several annuities or yearly rents or sums of 3*l*. each, or either of them, for all respective arrears, or either of them, and to sell and dispose of the distress and distresses then and there taken on them, or either of them, or otherwise demean therein according to law, in like manner as in case of distress taken for rent reserved by lease or common demise; to the end and intent that *the said T. G. Phillpotts the younger, and his assigns, may be fully paid and satisfied [*90 the said several annuities or yearly rents or sums of 3*l*. each respectively, or either of them, and all respective arrears or either of them, and all costs, charges, and expenses occasioned by the respective non-payment of the same: And the said T. G. Phillpotts the elder, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said T. G. Phillpotts the younger, and his assigns, by these presents, in manner following, that is to say, that he the said T. G. Phillpotts the elder, his heirs, executors, and administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the said T. G. Phillpotts the younger, or his assigns, for and during the natural life of him the said T. G. Phillpotts the younger, the said several annuities or clear yearly rent-charges of 3*l*. each, making together the sum of 12*l*., when the same shall respectively

become due and payable as aforesaid, without any deduction or abatement whatever, according to the true intent and meaning of these presents: In witness, &c.

The defendants then pleaded, that the said indenture in the declaration mentioned, was fraudulently and collusively made and executed by and between the said T. G. Phillpotts the elder and the plaintiff, for the purpose of multiplying the voices, and of splitting and dividing the interest, in divers houses and lands, to wit, the houses and lands in the said indenture mentioned, between the said T. G. Phillpotts the elder and the said plaintiff, in order to enable them to vote at elections of members to serve in parliament for the said several counties of Hereford, Gloucester, Monmouth, and Brecon, in the said indenture mentioned; and that the said indenture was not made *bond fide*, or for a *91] good or valuable consideration; but, on the contrary, was made *and executed solely for the purpose of multiplying voices as aforesaid, and under and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by virtue of the said indenture; but that the plaintiff should stand possessed of the said annuities or rent-charges as trustee for the said T. G. Phillpotts the elder, and not otherwise,—verification.

To this plea the plaintiffs replied *de injuriâ*.

The cause was tried before WILDE, C. J., at the sittings at Westminster, after the last term, when a verdict was found for the defendants.

Channell, Serjt., on a former day in this term, moved for judgment *non obstante veredicto*, on the ground that the plea afforded no answer to the action. The question arises upon the construction of the 7 & 8 W. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1. The former enacts "that all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, town corporate, port, or place, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be *void and of none effect*, and that no more than one single voice shall be admitted for one and the same house or tenement." And the latter, reciting the former provision, "for the more effectual preventing of such undue practices," enacts "that all estates and conveyances whatsoever made to any person or persons in any *fraudulent* or *collusive* manner, on purpose to qualify him or them to give his or their vote or votes at such elections of knights of the shire (subject, nevertheless, to conditions or agreements to defeat or determine such estate, or to re-convey the same), shall be deemed *92] and taken, against those persons who executed *the same, as free and absolute, and be holden and enjoyed by all and every such person or persons to whom such conveyance shall be made as aforesaid, freely and absolutely acquitted, exonerated, and discharged of and from all manner of trusts, conditions, clause of re-entry, powers of revoca-

tion, provisos of redemption, or other defeasances whatsoever, between or with the said parties, or any other person or persons in trust for them, or any of them, for the redeeming, revoking, or defeating such estate or estates, or for the restoring or re-conveying thereof, or any part thereof, to any person or persons who made or executed such conveyance, or to any other person in trust for them, or any of them, shall be *null and void to all intents and purposes whatsoever*; and that every person who shall make and execute such conveyance and conveyances as aforesaid, or, being privy to such purpose, shall devise or prepare the same, and every person who, by colour thereof, shall give any vote at any election of any knight or knights of the shire to serve in parliament, shall, for every such conveyance so made, or vote so created or given, forfeit the sum of 40*l.*," &c. Taking these two statutes together, the deed is clearly good to vest the estate in the grantee; though, possibly, it might be difficult to contend that a right to vote would be created under the facts stated upon this record. These two statutes were under the consideration of this court in a case of Alexander, app., Newman, resp., 2 Com. B. 122 (E. C. L. R. vol. 52), where TINDAL, C. J., in giving the judgment of the court, says: "The very language of the statute of William seems to point to the necessary distinction that real and *bond fide* conveyances were not intended to be avoided, although the motive or purpose of the parties might be that of multiplying voices at elections, but *such conveyances only made for that purpose as [*93 were pretended and fictitious. The statute says,—"*All conveyances* in order to multiply voices' are declared to be void. The statute names the conveyance only: it makes no reference whatever to any contract for sale upon which a real conveyance was grounded, nor professes to deal in any manner with the estate or interest in the land which was affected by such contract of sale, nor provides for the revesting of the land which passed into the possession of the purchaser under the contract of sale, nor for the repayment of the purchase-money to the purchaser,—all which provisions might reasonably be expected, if a conveyance upon a real *bond fide* contract of sale, and not a fictitious conveyance only, was intended to be avoided, on account of the motive upon which it was entered into." And, further, observing upon the statute of Anne, he says: "We consider this latter statute to be a legislative exposition of the clause of the statute of W. 3, therein set forth; that the avoiding of conveyances made in order to multiply voices at elections, was meant, by the original statute, to be confined to such conveyances only as were fraudulent and collusive,—to conveyances which are such in form only, but never intended to pass the property; or such as were accompanied with some secret trust or reservation for the benefit of the grantors; and not to extend to a *bond fide* conveyance made in contemplation of an actual contract of sale and purchase of land: for, the statute of Anne is expressly limited to fraudulent conveyances; and it

cannot be intended that the statute of Anne, passed to render the former statute of William more efficacious, should be, as to county elections, less comprehensive in its provisions than the former statute; or that the former should comprise within it the avoidance of a *bond fide* conveyance, when the latter is restricted to fraudulent conveyances only." [MAULE, J.—*It may be a question whether, even supposing *94] the deed would not enure to pass the land, it might not be good as a covenant for the payment of money.]

A rule nisi having been granted,

Byles, Serjt., and *Crompton*, now showed cause.—The deed in question is void, under the statute 7 & 8 W. 3, c. 25, s. 7; and also void at common law: and the subsequent statute of 10 Ann. c. 23, s. 1, affords no answer to this defence,—which it is competent to the defendant to rely on, although the parties are *in pari delicto*. The 7 & 8 W. 3, c. 25, s. 7, expressly says that all conveyances of any messuages, lands, &c., in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, shall be *void and of none effect*. Here, the plea alleges that that was the object and the *only* object of the deed. That statute was merely declaratory of the common law upon the subject; as appears from the judgment of this court in *Alexander*, app., *Newman*, resp., where TINDAL, C. J., cites with approbation what his lordship justly calls, the high authority of Lord SOMERS, in the case of *Onslow v. The Bailiff of the Borough of Haslemere*, Lord Somers's Tracts, vol. viii. p. 275, for the position that "all such conveyances as are not real and made *bond fide*, upon good consideration, are void at common law." And this is in consonance with the maxim "*Ex turpi causâ non oritur actio*." The statute of Anne, no doubt, was pointed at the same mischief. There is nothing in that act, to avoid the covenants contained in the deed: the estate passes. [MAULE, J.—The 7 & 8 W. 3, c. 25, s. 7, merely says that the *conveyance* shall be void; it says *95] nothing about the *deed*.] It is difficult to say of a *grant of an incorporeal hereditament, that the *conveyance* shall be void and of none effect, and yet that the remedy upon the *covenant* shall remain. [MAULE, J.—It would be the most effectual way of deterring parties from making these contrivances, to hold that no vote was conferred, and yet that the deed was good to the extent of rendering the covenantor liable upon his covenant.] The conveyance,—the grant of the annuity,—is void: how, then, can the covenant entered into with a view to carry into effect that illegal grant, be valid? [MAULE, J.—May not the conveyance be void to the extent only of effectuating the object which the legislature had in view,—as in the case of ecclesiastical leases? In *Mouys v. Leake*, 8 T. R. 411, it was held, that, although the grant of a rent-charge by the rector was void by the statute, yet that if in the deed, he also covenants personally to pay the rent-charge

or annuity, and gives a warrant of attorney as a collateral security, the securities are not void. So, in *Kerrison v. Cole*, 8 East, 231, it was held, that, though the bill of sale for transferring the property in a ship, by way of mortgage, might be void as such for want of reciting the certificate of registry therein, as required by the 26 G. 3, c. 60, yet the mortgagor might be sued on his personal covenant contained in it, for repayment of the money lent. And in *Sloane v. Packman*, 11 M. & W. 770,† 1 D. & L. 332, a declaration in covenant stated that the defendant had granted an annuity to the plaintiff, and, for the better securing the said annuity, demised the rectory and prebendal stall to certain trustees, and covenanted for payment of the annuity; and alleged as a breach, the non-payment thereof: to this declaration, the defendant, being under terms to plead issuably, pleaded that the indenture was made with the view of charging, and was a charge upon, the *rec- [*96 tory, the same being a benefice with cure of souls, contrary to the statute 13 Eliz. c. 20, and that the indenture and security were made to evade the statute; and the plea was held not to be an issuable one, inasmuch as it stated no new fact upon which the plaintiff could go to the jury, and that the statute avoided the charge upon the benefice only, but not the covenant in the deed which contained it.] The leases mentioned in the statute 13 Eliz. c. 20, were valid deeds at common law; whereas, this is a thing prohibited by the common law. [MAULE, J.—It is only prohibited to the intent and to the extent of defeating the fraudulent object, to defeat which it is declared void. There is nothing in the policy of the statute, or the common law, to make this annuity otherwise than a valid one.] The whole contract is tainted with fraud. The statute of Anne does not at all affect the case. [MAULE, J.—To bring the conveyance within the mischief of the statute of Anne, it must have these two qualifications,—it must be fraudulent, and it must be made subject to a condition or agreement to defeat or determine the estate, or to re-convey the same.]

Channell, Serjt., and *Gray*, in support of the rule.—In *Alexander*, app., *Newman*, resp., the question to be determined, was, whether the conveyance would or would not confer a right to vote. The deed there was held not to be void: but a case was suggested, very nearly resembling this, where the right to vote would not be given. It is said that *TINDAL*, C. J., treated the conveyance in the case supposed, as one which would be void at common law,—assuming the statute 7 & 8 W. 3, c. 25, s. 7, as declaratory of the common law. But the court did not mean to treat it as a conveyance void to all intents and purposes, but only as void to the extent of conferring a right to vote. The distinction *is a very important one. Sufficient effect will be given [*97 to the statute, by holding the deed valid except for the purpose of conferring a vote. In *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367, where a conveyance of an estate from one brother to another, was executed for the

purpose of giving the latter a colourable qualification to kill game,—it was held, that, as against the parties, the deed was valid, and sufficient to support an ejectment for the premises. Wherever a deed is fraudulent, it may be avoided so far as it affects the rights of third parties, though valid as between the parties themselves. [MAULE, J.—It may be that the statute of W. 3 is declaratory of parliamentary law only.] The statute of Anne was intended more effectually to accomplish what the statute of William had attempted, by declaring the conveyance to be good as against the grantor. The statute of Anne points to the same sort of deeds as the former statute; but it varies the remedy. [MAULE, J.—The statute of Anne recites the statute of William as an *enacting*, and not as a mere declaratory act.]

JERVIS, O. J.—I am of opinion that the plea in this case affords no answer to the declaration, and that the rule for entering judgment for the plaintiff *non obstante veredicto*, must be made absolute. The question is, whether the covenant to pay these annuities is a binding covenant as between the parties, notwithstanding the matters alleged in the plea. Before I consider the effect of the statutes which have been referred to, it may be as well to dispose of the question of estoppel. It is to my mind exceedingly difficult to discover any distinction between this case and that of Doe d. Roberts v. Roberts. It may be that a deed may be bad so far as concerns the law of parliament, and yet, as between the *parties, it may not be competent to either to set up its invalidity. *98] The very point was discussed in Bessey v. Windham, 6 Q. B. 166 (E. C. L. R. vol. 51), where, though the jury expressly found that the parties never intended anything to pass by the deed, the Court of Queen's Bench held the deed to be operative to convey an interest in the goods as between the parties,—on the principle laid down in Doe d. Roberts v. Roberts. Upon the same principle, I think the deed may be supported in the present case. But I think it may also be supported upon the construction of the 7 & 8 W. 3, c. 25, s. 7, and 10 Anne, c. 23, s. 1. The 7 & 8 W. 3, c. 25, is said to be a declaratory act. What was the law, of which it is supposed to be declaratory? It declares that there shall be no more than one vote for any one house or tenement, and that any conveyance made for the purpose of defeating that object, shall be null and void. Now, the intention of that statute would be fully carried into effect, if the grant were held not to have effect so as to confer a vote, and yet that the covenant should enure as a binding covenant between the parties. The legislature, however, finding that provision to be inoperative, passed the subsequent statute of Anne, in order, by another contrivance, to defeat these fraudulent conveyances: and, accordingly, this latter statute provides, that, notwithstanding the secret trusts, the conveyance shall be good for all purposes except for that of conferring a vote. The conveyance is to be good and operative so as to pass the estate, but not so as to give a vote; and it imposes a penalty. Upon

both grounds, therefore,—first, that it is not competent to the grantor to set up his own fraud,—and, secondly, upon the construction of the statutes,—I am of opinion that the rule must be made absolute.

*MAULE, J.—I am of the same opinion. It is the defendants, [*99 and not the plaintiff, who seek to set up the fraud to which their testator was a party. *Doe d. Roberts v. Roberts* is an authority to show that it is not competent to them to do so: and that is consistent with a multitude of older authorities. Supposing this were not so, I think this plea affords no answer to the action. It proceeds upon the ground that a covenant to pay money is void, if made in pursuance of such an agreement as must be taken to be found upon this plea, viz. an agreement to multiply votes, with a secret trust and condition that no beneficial interest should pass by the conveyance to the plaintiff;—in short, bringing it within the common law of parliament as declared in the statute 7 & 8 W. 3, c. 25. That statute relates to the election of members to serve in parliament. The 7th section is, “that all conveyances of any messuages, lands, tenements, or hereditaments, in any county, &c., in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby *declared* to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or tenement.” In terms, it is declaratory. In the recital of the 10 Anne, c. 23, it is called enacting. It may be both. The question is, what is its effect? It does not use the words which are commonly used where it is intended to avoid contracts: it does not say that the *deed* shall be void; but that the *conveyance* shall be,—not “void to all intents and purposes,”—but “void and of none effect:” so that complete effect will be given to the statute by holding the deed to be void in respect of its failing to operate to create a multiplicity of votes. The policy of the law always is, not to make contracts void to a *greater extent than the mischief to be remedied renders [*100 necessary. Such was the state of the law for about sixteen years, until the passing of the statute of Anne. That statute recites the former provision, and that it had been found insufficient to prevent the practices against which it was levelled. In its enacting part, it does not avoid any conveyance whatever, but makes some conveyances more effectual than they were before. It, however, tends to throw some light upon the statute of William. That statute, according to the true construction of it, invalidated conveyances so far as to prevent them from conferring votes, but left them valid in other respects. The legislature, finding, that, by merely avoiding the conveyance to this extent, and leaving it effectual as a grant,—and, amongst other things, leaving the condition or qualification for the benefit of the party affecting to confer the vote,—in passing the statute of Anne, professing to deal with *fraudulent* instruments, enact that such fraudulent conveyances, though made

subject to conditions or agreements to defeat or determine the estate, or to re-convey the same, shall be deemed and taken, against those persons who executed the same, as free and absolute, and be holden and enjoyed by the grantee freely and absolutely acquitted and exonerated from all manner of trusts, conditions, clauses of re-entry, powers of revocation, &c. That provision seems to assume that the construction which I put upon the statute of William is the true construction. It assumes that the statute of William does not prevent the property from passing: and it makes the condition void, and the estate absolute. I therefore think that the true construction of these two statutes, is, that, dealing only with the subject of parliamentary law, they prevent a man from acquiring a right to vote which it was contrary to the policy of the law that *101] he should acquire: but that they *leave the conveyance to operate upon the land freely and absolutely in all other respects.(a) I think, therefore, that, assuming that this was a matter which it was competent to the defendant to set up, it affords no answer to the action.

WILLIAMS, J.—I also am of opinion that the plaintiff in this case is entitled to judgment, notwithstanding the verdict found for the defendant upon this plea. The plea alleges that the deed was fraudulently and collusively made, for the mere purpose of creating votes, with an understanding that it should not operate beneficially to the grantee. It seems to me that the cases of Doe d. Roberts v. Roberts and Bessey v. Windham show that it is not competent to the defendant to set up the supposed fraud. I therefore do not think it necessary to express any opinion upon the construction of the two statutes to which reference has been made.

TALFOURD, J.—I am of the same opinion. The cases of Doe d. Roberts v. Roberts and Bessey v. Windham seem to me to remove the whole foundation upon which this plea rests. I therefore abstain from discussing the statutes 7 & 8 W. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1: not that I mean to express any doubt as to the correctness of the construction which has been put upon them by my lord and my brother MAULE; for, I do not feel any. Rule absolute.

(a) *Quære*, whether an enactment that a conveyance shall be void and of none effect, does not import that the property expressed to be conveyed, shall remain unconveyed?

It is well settled that a deed made to defraud creditors, which is void as to them, is nevertheless good as between the parties, and cannot be impeached by them or those voluntarily claiming under them. *Reichart v. Castator*, 5 Binn. 109; *Osborne v. Maas*, 7 Johns. 161; *Hendricks v. Mount*, 2 Southard, 738; *Sumner v. Murphy*, 2 Hill's (South Carolina) Rep. 488; *Findley v. Cooley*, 1 Blackford, 262; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Clapp v. Tirrel*, 20 Pick. 247; *Chapin v. Pease*, 10 Conn. 69; *Jackson v. Cadwell*, 1 Cowen, 622; *Sheek v. Endress*, 3 Watts and Serg. 255; *Neely v. Wood*, 10 Yer-

ger, 486. A party to a fraudulent conveyance cannot set up his fraud to avoid the conveyance, nor can his grantee or his heir be heard to aver the existence of such fraud to prevent the operation of the doctrine of estoppel. *Barton v. Morris*, 15 Ohio, 408. The representative of a fraudulent vendor cannot impeach the sale of the vendor; yet if the vendor relinquish his claim, the estate shall be regarded as the estate of the deceased. *Sharp v. Caldwell*, 7 Humph. 415. A sale made by a debtor to one creditor in order to prefer him and delay another, cannot be avoided by that other as fraudulent,

although the vendee knew of the vendor's intent. *Brown v. Smith*, 7 B. Monroe, 361.

A deed, whether voluntary and without consideration or for a valuable consideration, made upon a parol trust, declared at the time of the execution of the deed, that the grantee would hold in trust for the children of the grantor, if intended as a fraud upon creditors of the grantor is void as against the creditors, but it is valid as against the grantor and the children for whose benefit it was designed, and the grantee will be entitled to hold against the children or their vendee; whether the trust be by parol or in writing the rule is the same, and the circumstance of the grantee of the children being in possession will not vary the principle. *Murphy v. Hubert*, 16 Penn. State Rep. 50. Per ROGERS, J., "If there be a point settled on reason and authority, it is that a deed intended to defraud creditors, although void as against creditors, yet is valid as against the grantor and those for whose benefit it is designed, whether it be the grantor himself, his child or children, or a stranger. The grantee holds the property as against the fraudulent grantor and

his beneficiaries, without consideration, and consequently placed in no better situation than the grantor, discharged from all secret trusts whether in writing or by parol. That a trust cannot be enforced when it is designed to effect a fraud on creditors, is settled by authority. The cases without exception decide that such a trust is void in itself, and therefore incapable of being made the foundation of a right in others. The rule is founded on policy. Courts of justice do not sit to extricate a rogue from his toils. To enable a party to share a secret trust in the face of an absolute deed, the purpose must have been an honest one, else, by secret fraudulent device, a dishonest man would be sure never to lose, and he has the chance of gaining. He may accomplish his fraudulent design, and then he is sure to get back his property, or, what is the same thing, keep it for his family. This would be affording encouragement to such frauds. On the contrary, it is the policy of common sense and common law to environ a person with all possible perils, and to make it appear that honesty is the best policy." *Ibid*.

*Ex parte The Bishop of EXETER, in re GORHAM v. The Bishop of EXETER. [*102

By the 24 H. 8, c. 12, ss. 2, 5, 6, 7, 8, all causes within the spiritual jurisdiction, relating to wills, to matrimony and divorce, and to tithes, oblations, and obventions, were to be determined in the King's courts; and where, in such cases, the appeal used to be made to the see of Rome, it was thenceforward to be carried from the archdeacon's court (if commenced therein) to the bishop's court, and from the bishop's court to that of the archbishops, whose decision was to be final. By s. 9, in case any such cause should touch the King, the appeal from any of the said courts was to be made to the upper house of convocation for the province.

By the 25 H. 8, c. 19, ss. 3, 4, no appeal was to be made to Rome in any cause arising within this realm; but all appeals were to be made in the manner limited by the 24 H. 8, c. 12, for causes of matrimony, tithes, oblations, &c. An ulterior appeal was given, for lack of justice in the archbishop's courts, to the King in Chancery; and, on such appeal, a commission under the great seal was to issue to such persons as the King should name, to hear such appeal. The judicial committee of the privy council was substituted for such commission, by the statutes 2 & 3 W. 4, c. 92, s. 3, and 3 & 4 W. 4, c. 41, s. 3:—

Held, that, if the crown presents a clerk to a vicarage in its gift, and the ordinary refuses to admit him, on the ground that he maintains unsound doctrine, and, on a *duplex querela* brought in the archbishop's court, the judge, for the same reason, pronounces sentence confirming such refusal to admit,—the appeal lies to the judicial committee of the privy council, and not to the upper house of convocation.

SIR F. Kelly, in Easter term last, moved for a rule to show cause why a writ of prohibition should not issue to the Dean of the Arches, and to the Archbishop of Canterbury, to prohibit them from requiring the Lord Bishop of Exeter to institute the Rev. George Cornelius Gorham to the vicarage of Brampford Speke, and also to prohibit the said dean and archbishop from instituting the said George Cornelius Gorham to the said vicarage, or otherwise carrying into execution an order of

Her Majesty in council, made on the 9th of March, 1850, upon a report of the judicial committee of the privy council, in an appeal from the judgment of the court of Arches in a suit of *Duplex Querela* between the said George Cornelius Gorham and the said lord bishop.

*103] *The motion was founded upon affidavits, which stated the following facts,—that the vicarage of Brampford Speke, in the county of Devon, is a benefice with cure of souls within the diocese of Exeter, and that the patronage of, and right of presentation to, the said vicarage belongs to, and is lawfully vested in, Her Majesty Queen Victoria, in right of Her crown, and that Her said Majesty, in right of Her said crown, is seized as of fee of the advowson of the said vicarage as of one in gross: that, on the 3d of March, 1847, the said vicarage became void by the death of the Rev. John Mudge, who theretofore, and until the time last aforesaid, had been the vicar thereof, and that thereupon afterwards, that is to say, on the 2d of November, in the year last aforesaid, the said vicarage then being and remaining void as aforesaid, Her said Majesty the Queen, as patron of the said vicarage, in right of Her said crown as aforesaid, did, by letters-patent under the great seal of Great Britain, bearing date the day and year last aforesaid, present to the bishop the Rev. George Cornelius Gorham, clerk, as Her Majesty's clerk appointed to the said vicarage, commanding and requiring the said bishop to admit the said George Cornelius Gorham to the said vicarage, and him then to institute, induct, and invest with all and every the rights, members, and appurtenances thereof, and to do all and singular other matters and things in any wise concerning the admission, institution, and induction aforesaid, which to the bishop's pastoral office belonged or appertained: that the said bishop is the ordinary, and hath full ecclesiastical and spiritual jurisdiction in and over the said vicarage, and the vicar thereof for the time being, and that as such bishop and ordinary, he had full and sole right and authority by law to admit, institute, and induct, or to authorize the admission, institution, and induction of each and every person from time to

*104] *time presented by her said Majesty, as such patron as aforesaid, for admission, institution, and induction into the said vicarage, as the vicar thereof, and that, before such admission, institution, or induction as aforesaid, the said bishop had also the full and sole right and authority by law, and that it was moreover his bounden duty and obligation, to examine the person so presented, and to ascertain and determine, as the spiritual judge, the fitness and qualifications of such person for such admission, institution, and induction, with reference as well to his faith and doctrine, as to his learning, morals, ability, and sufficiency, according to the laws ecclesiastical of this realm; and, in the event of his finding and determining, upon such examination, that the person so presented as aforesaid, is unfit or unqualified, by reason of his insufficiency in any of the matters aforesaid, then to refuse to admit, institute, and

induct such person into the vicarage aforesaid as the vicar thereof: that, upon the said presentation of Her said Majesty of the said George Cornelius Gorham, and after the receipt of the said letters-patent, the said bishop, as such bishop and ordinary as aforesaid, according to his said right and duty in that behalf, did duly examine the said George Cornelius Gorham, in order to ascertain and determine whether he the said George Cornelius Gorham was fit and qualified, according to the laws ecclesiastical of this realm, to be admitted, instituted, and inducted to the said vicarage, and that, upon such examination by him the said bishop as such bishop and ordinary as aforesaid, he the said bishop ascertained and determined, according to his conscientious judgment and belief, that the said George Cornelius Gorham did then hold, maintain, and affirm certain unsound doctrines and opinions, contrary to the true Christian faith, and contrary to, and inconsistent with, the doctrines of the Church of England, the thirty-nine articles of religion, and the book of *common prayer authorized and enjoined by the statute 13 & 14 Car. 2, c. 4: that, by reason and in consequence of the said [*105 George Cornelius Gorham's so holding, maintaining, and affirming such doctrines and opinions as aforesaid, he the said bishop, as such bishop and ordinary as aforesaid, did then adjudge and determine that the said George Cornelius Gorham was a person unfit and unqualified to be admitted, instituted, and inducted to the said vicarage, and that such holding, maintaining, and affirming such doctrines and opinions as aforesaid, was a lawful and sufficient cause for the bishop's refusing to admit, institute, and induct the said George Cornelius Gorham to the said vicarage: that, by reason thereof, the said bishop did thereupon then refuse to admit the said George Cornelius Gorham to the said vicarage, or to institute, induct, or invest him with all or any of the rights, members, and appurtenances thereof: that, of such his refusal, the said bishop did afterwards, and within a convenient time in that behalf, that is to say, on or about the 21st of March, 1848, give notice to Her said Majesty of such refusal, that is to say, by a letter addressed to one of Her said Majesty's principal secretaries of state: that, upon such his refusal being so signified to Her said Majesty as aforesaid, that is to say,—in Michaelmas term, 1848, an action of *quare impedit* was commenced and instituted in the name and on the behalf of Her said Majesty, by the Attorney-General against the said bishop, in the Court of Queen's Bench, for such refusal,—which action was still depending: that, in consequence of the bishop's refusal to admit, institute, and induct the said George Cornelius Gorham to the said vicarage as aforesaid, the said George Cornelius Gorham thereupon, that is to say, in Trinity term, 1848, commenced and instituted a suit, commonly called a *duplex querela*, against the said bishop, in the Court of Arches, before the *Rt. Hon. Sir HERBERT JENNER FUST, Knt., then and still being dean of the Arches, and official principal of the said [*106

Arches court of Canterbury, and judge of the said court,—such suit being in the nature of an appeal from the said judgment and determination of the said bishop, as such bishop and ordinary as aforesaid, of the said George Cornelius Gorham being so unfit and unqualified to be admitted, instituted, and inducted to the said vicarage as aforesaid: that the said suit came on for hearing before the said Sir HERBERT JENNER FUST, who, on the 2d of August, 1849, gave judgment therein, and did then adjudge and determine that the said George Cornelius Gorham did hold and maintain such unsound doctrines and opinions as aforesaid, and that, by reason thereof, he was unfit and unqualified to be instituted and inducted to the said vicarage as aforesaid, and that the said bishop had shown sufficient cause for refusing, and was justified in refusing to admit, institute, and induct the said George Cornelius Gorham to the said vicarage as aforesaid, and that the bishop was by reason thereof entitled to be dismissed, and was dismissed, with costs: that after the delivery of the said judgment by the said Sir HERBERT JENNER FUST, the said George Cornelius Gorham appealed from the said judgment to Her said Majesty in council, and presented his petition to Her said Majesty, praying that the said judgment might be reversed and annulled, and that he the said George Cornelius Gorham might be declared to be fit and qualified to be, and might be, admitted, instituted, and inducted to the said vicarage: that the petition of the said George Cornelius Gorham was, by an order of council, made on the 1st of November, 1849, referred by Her said Majesty to the judicial committee of Her privy-council, and that thereupon the said judicial committee, in pursuance of the said order, on the 11th of December, in the year last aforesaid, *107] proceeded to consider the matter of the said petition, and heard the counsel for the said George Cornelius Gorham, in support of his said petition, and on appeal from the said judgment, and also the counsel for the bishop, in support of the judgment: that, after the hearing of the said appeal, that is to say, on the 8th of March, 1850, the said judicial committee of the privy-council made their report or recommendation to Her Majesty in council, in favour of the said appeal, and reported to Her said Majesty that the said judgment of the said Sir HERBERT JENNER FUST ought to be reversed, and that it ought to be declared that the bishop had not shown sufficient cause why the said George Cornelius Gorham should not be admitted, instituted, and inducted to the vicarage aforesaid; and that the said judicial committee further reported to Her said Majesty that the said principal cause ought to be remitted to the said official principal of the court from which the said appeal had been brought, in order that right and justice might be then done and administered in the premises, in pursuance of such declaration: that, by an order in council, made on the 9th of March, 1850, Her said Majesty, having approved of the said report and recommendation of the said judicial committee, did order and direct that the said report and

recommendation should be duly and punctually observed, complied with, and carried into execution; and it was also thereby ordered that the said official principal of the said Arches court of Canterbury, and all other persons whom it might concern, should take notice thereof, and govern themselves accordingly: that, in pursuance of that order, the cause of the said George Cornelius Gorham against the Bishop of Exeter had been remitted to the said Arches court of Canterbury, and that the said official principal of the said Arches court was proceeding to comply with and carry into execution the said report and recommendation of *the said judicial committee, pursuant to the last-mentioned order of Her Majesty in council; and that he had also, in order there- [*108 to, caused a monition to be served upon the registrar of the episcopal court of the said bishop (and also upon the said bishop), requiring him (the registrar) to return to the said Arches court of Canterbury the said letters-patent of Her said Majesty, whereby the said George Cornelius Gorham was presented to the bishop, as such bishop and ordinary as aforesaid, for admission, institution, and induction to the said vicarage as aforesaid: that the said George Cornelius Gorham was about to be admitted, instituted, admitted, and inducted into the said vicarage by or under the authority of the said Archbishop of Canterbury, under and by virtue of the said order of Her said Majesty in council, and in pursuance of the said report and recommendation of the said judicial committee, unless prohibited and prevented by this court: that the said bishop had, since the hearing of the said appeal by the said judicial committee of the privy-council, been advised by his counsel, that the said George Cornelius Gorham was not entitled or allowed by law to appeal to Her said Majesty in council against the said judgment of the said official principal of the said Arches court of Canterbury, and that Her Majesty had no power or authority by law to refer the said petition of the said George Cornelius Gorham to the said judicial committee of Her privy-council, and that the said judicial committee had no power or authority in law to consider the matter of the said petition, or to hear counsel thereon, or to make their said report and recommendation to Her said Majesty thereon, and that Her said Majesty had no power or authority in law to make the said order in council of the 9th of March, 1850, and that the said official principal of the said Arches court of Canterbury had no power or authority in law to comply with or carry into execution the said *report and recommendation of the said judicial committee, or to give effect to the same order in council, [*109 and that the said Archbishop of Canterbury had no power or authority in law to admit, institute, or induct, or to authorize the admission, institution, or induction of the said George Cornelius Gorham to the vicarage aforesaid; but, on the contrary thereof, that the said appeal of the said George Cornelius Gorham to Her said Majesty in council, and all the said several matters and proceedings had thereon, were wholly null and

void in law, and that the said judgment of the said Sir HERBERT JENNER FUST, the said official principal of the said Arches court of Canterbury, was, and continued, valid in law, and in full force and effect, and not in any respect annulled or weakened: and that the said bishop was not, before or at the time of the hearing of the said appeal before the said judicial committee of the privy-council, nor for some time afterwards, informed or aware that the said George Cornelius Gorham was not entitled or allowed by law to appeal to Her said Majesty in council against the said judgment, or that the said matters and proceedings had, or likely to be had, thereon, were or would be null and void in law, and that he had no opportunity, and was not able, at any time before or during the said hearing of the said appeal, to object to, or protest against, the jurisdiction or authority of Her said Majesty, or of the said judicial committee in the matters aforesaid.

The affidavits set out the pleadings in the *quare impedit*, and the proceedings in the Arches court, from which it appeared that the unsoundness of doctrine imputed to Mr. Gorham, was, "that spiritual regeneration is not given or conferred in the sacrament of baptism,—in particular, that *infants* are not made therein members of Christ and the children *110] of God." The *appendix submitted to the judicial committee was also set out, with several other documents.

Sir Fitzroy Kelly, after stating the substance of the affidavits, urged as follows:—The appeal from the Court of Arches lies, not to the judicial committee of the privy-council, or to Her Majesty in council, but to the upper house of convocation; and, consequently, the judgment of the dean of the Arches remains in full force; and all that may be done under the order in council of the 9th of March, 1850, will be illegal and void, and the proper subject of a prohibition. This motion has already been unsuccessfully made to the Court of Queen's Bench; that court having, after deliberation, refused to grant a rule. The case, however, presents so much doubt and difficulty, and the judgment of the Court of Queen's Bench,—though entitled to the highest respect and consideration,—is open to so much question, that the bishop feels it to be his duty to urge the matter before another court.

The question depends mainly upon the construction of two acts of parliament passed in the reign of King Henry the Eighth. It is familiar to the court, that, although antiquaries and historians state, that, by the ancient law of England, the sovereign was the head of the Church, yet a practice, by usurpation, for many centuries prevailed, of appealing in spiritual matters, not to the king, but to the Pope; and that, after certain national occurrences to which it is unnecessary now to advert, a statute *111] of 24 H. 8, c. 12,(a) was passed to *put an end to that practice. That statute, however, related only to three classes of causes,—

(a) In the edition of the Statutes printed by command of his Majesty King George 3, in pursuance of an address of the House of Commons, the 24 Hen. 8, c. 12, stands thus:—"An Act

causes *testamentary,—causes relating to matrimony and divorce, [*112
—and causes relating to tithes, oblations, and obventions. *Un- [*113
der this act, an appeal was given from the bishop's court to that

that the appeals in such cases as have been used to be pursued to the See of Rome shall not be from henceforth had no used but within this realm."—"Where, by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and King, having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen to bear, next to God, a natural and humble obedience; He being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole, and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folk, resiants or subjects within this His realm, in all causes, matters, debates, and contentions happening to occur, insurge, or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world: The body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the said body politic called the spirituality, now being usually called the English church, which always hath been reputed and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain: For the due administration whereof, and to keep them from corruption and sinister affection, the King's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church both with honour and possessions: And the laws temporal, for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without ravyn or spoil, was and yet is administered, adjudged, and executed by sundry judges and administrators of the other part of the said body politic, called the temporality; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other: And where the King, his most noble progenitors, and the nobility and commons of this said realm, at divers and sundry Parliaments, as well in the time of King Edward 1, Edward 3, Richard 2, Henry 4, and other noble Kings of this realm, made sundry ordinances, laws, statutes, and provisions for the entire and sure conservation of the prerogatives, liberties, and pre-eminences of the said imperial crown of this realm, and of the jurisdictions spiritual and temporal of the same, to keep it from the annoyance as well of the see of Rome, as from the authority of other foreign potentates, attempting the diminution or violation thereof, as often, and from time to time, as any such annoyance or attempt might be known or espied: And notwithstanding the said good statutes and ordinances made in the time of the King's most noble progenitors, in preservation of the authority and prerogative of the said imperial crown, as is aforesaid; yet, nevertheless, sithen the making of the said good statutes and ordinances, divers and sundry inconveniences and dangers, not provided for plainly by the said former acts, statutes, and ordinances, have arisen and sprung by reason of appeals sued out of this realm to the see of Rome, in causes testamentary, causes of matrimony and divorces, right of tithes, oblations, and obventions, not only to the great inquietation, vexation, trouble, costs, and charges of the King's highness, and many of His subjects and resiants in this His realm, but also to the great delay and let to the true and speedy determination of the said causes, for so much as the parties appealing to the said court of Rome most commonly do the same for the delay of justice: And forasmuch as the great distance of way is so far out of this realm, so that the necessary proofs, nor the true knowledge of the cause, can neither there be so well known, ne the witnesses there so well examined, as within this realm, so that the parties grieved by means of the said appeals be most times without remedy: In consideration whereof, the King's highness, His nobles and commons, considering the great enormities, dangers, long delays, and hurts, that, as well to his highness as to His said nobles, subjects, commons, and resiants of this His realm, in the said causes testamentary, causes of matrimony and divorces, tithes, oblations, and obventions, do daily ensue, doth therefore by His royal assent, and by the assent of the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by authority of the same, enact, establish, and ordain, that all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations, and obventions, the knowledge whereof, by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm, already commenced, moved, depending, being, happening, or hereafter coming in contention, debate, or question, within this realm, or within any the King's dominions or marches of the same, or elsewhere, whether they concern the King our sovereign lord, His heirs or successors, or any other subjects

- *114] of the archbishop, and thence to the court *of delegates, whose decision,—except in matters wherein the King was interested,—
 *115] was final. These three *classes of causes, which are partly of a temporal and partly of a spiritual nature, were the sole subject

or resiants within the same, of what degree soever they be, shall be from henceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the King's jurisdiction and authority, and not elsewhere, in such courts spiritual and temporal of the same as the natures, conditions, and qualities of the causes and matters aforesaid in contention, or hereafter happening in contention, shall require, without having any respect to any custom, use, or sufferance, in hindrance, let, or prejudice of the same, or to any other thing used or suffered to the contrary thereof, by any other manner of person or persons, in any manner of wise; any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or any other process or impediments, of what natures, names, qualities, or conditions soever they be, from the see of Rome or any other foreign courts or potentates of the world, or from and out of this realm, or any other the King's dominions, or marches of the same, to the see of Rome, or to any other foreign courts or potentates, to the let or impediment thereof, in anywise notwithstanding. And that it shall be lawful to the King our sovereign lord, and to His heirs and successors, and to all other subjects or resiants within this realm, or within any of the King's dominions, or marches of the same, notwithstanding that hereafter it should happen any excommengements, excommunications, interdictions, citations, or any other censures or foreign process out of any outward parts, to be fulminate, promulged, declared, or put in execution within this said realm, or in any other place or places, for any of the causes before rehearsed, in prejudice, derogation, or contempt of this said act, and the very true meaning and execution thereof, may and shall, nevertheless, as well pursue, execute, have, and enjoy the effects, profits, benefits, and commodities of all such processes, sentences, judgments, and determinations done, or hereafter to be done, in any of the said courts spiritual or temporal, as the cases shall require, within the limits, power, and authority of this the King's said realm and dominions and marches of the same, and those only and none other to take place, and to be firmly observed and obeyed within the same: As also, that all the spiritual prelates, pastors, ministers, and curates within this realm, and the dominions of the same, shall and may use, minister, execute, and do, or cause to be used, executed, ministered, and done, all sacraments, sacramentals, divine services, and all other things within the said realm and dominions, unto all the subjects of the same, as Catholic and Christian men owe to do; any former citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals, for or touching the causes aforesaid, from or to the see of Rome, or any other foreign prince or foreign courts, to the let or contrary thereof in anywise notwithstanding. And, if any of the said spiritual persons, by the occasion of the said fulminations of any of the same interdictions, censures, inhibitions, excommunications, appeals, suspensions, summons, or other foreign citations for the causes beforesaid, or for any of them, do at any time hereafter refuse to minister or cause to be ministered the said sacraments and sacramentals and other divine services in form as is aforesaid, shall, for every such time or times that they or any of them do refuse so to do, or cause to be done, have one year's imprisonment, and to make fine and ransom at the King's pleasure.

2. "And it is further enacted, by the authority aforesaid, that, if any person or persons inhabiting or resiant within this realm, or within any of the King's said dominions, or marches of the same, or any other person or persons, of what estate, condition, or degree soever he or they be, at any time hereafter, for or in any of the causes aforesaid, do attempt, move, purchase, or procure, from or to the see of Rome, or from or to any other foreign court or courts out of this realm, any manner of foreign process, inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, or judgments, of what nature, kind, or quality soever they may be, or execute any of the same process, or do any act or acts to the let, impediment, hindrance, or derogation of any process, sentence, judgment, or determination had, made, done, or hereafter to be had, done, or made, in any courts of this realm, or the King's said dominions, or marches of the same, for any of the causes aforesaid, contrary to the true meaning of this present act, and the execution of the same, that then every such person or persons so doing, and their factors, comforters, abettors, procurors, executors, and counsellors, and every of them, being convict of the same, for every such default, shall incur and run in the same pains, penalties, and forfeitures ordained and provided by the statute of provision and *præsumptio*, made in the sixteenth year of the reign of the right noble prince King Richard 2, against such as attempt, procure, or make provision to the see of Rome, or elsewhere, for anything or things to the derogation, or contrary to the prerogative or jurisdiction, of the crown and dignity of this realm.

3. "And furthermore, in eschewing the said great enormities, inquietations, delays, charges,

of that *statute. Where the rights of the crown intervened, there was an appeal from the archbishop to the upper house of convocation. Then came the 25 H. 8, c. 19.(a) *By this statute the provisions of the 24 H. 8, c. 12, were extended to all manner of

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[*117]

and expenses hereafter to be sustained in pursuing of such appeals and foreign process, for and concerning the causes aforesaid, or any of them, do, therefore, by authority aforesaid, ordain and enact, that, in such cases where heretofore any of the King's subjects or resiants have used to pursue, provoke, or procure any appeal to the see of Rome, and in all other cases of appeals, in or for any of the causes aforesaid, they may and shall from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise; that is to say, first from the archdeacon or his official, if the matter or cause be there begun, to the bishop diocesan of the said see, if in case any of the parties be grieved; And likewise, if it be commenced before the bishop diocesan or his commissary, from the bishop diocesan or his commissary, within fifteen days next ensuing the judgment or sentence thereof there given, to the archbishop of the province of Canterbury, if it be within his province, and, if it be within the province of York, then to the archbishop of York, and so likewise to all other archbishops in other the King's dominions, as the case by the order of justice shall require; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts: And, if the matter or contention for any of the causes aforesaid, be, or shall be, commenced, by any of the King's subjects or resiants, before the archdeacon of any archbishop, or his commissary, then the party grieved shall or may take his appeal, within fifteen days next after judgment or sentence there given, to the court of the arches or audience of the same archbishop or archbishops; and from the said court of the arches or audience, within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be definitively and finally determined, without any other or further process or appeal thereupon to be had or sued.

4. "And it is further enacted, by the authority aforesaid, that all and every matter, cause, and contention now depending, or that hereafter shall be commenced by any of the King's subjects or resiants for any of the causes aforesaid, before any of the said archbishops, that then the same matter or matters, contention or contentions, shall be before the same archbishop where the said matter, cause, or process shall be so commenced, definitively determined, decreed, or adjudged, without any other appeal, provocation, or any other foreign process out of this realm to be sued, to the let or derogation of the said judgment, sentence, or decree, otherwise than is by this act limited and appointed: Saving always the prerogative of the archbishop and church of Canterbury, in all the foresaid causes of appeals to him and to his successors, to be sued within this realm, in such and like wise as they have been accustomed and used to have heretofore: And, in case any cause, matter, or contention now depending for the causes before rehearsed, or any of them, or that hereafter shall come in contention for any of the same causes, in any of the foresaid courts, which hath, doth, shall, or may touch the King, His heirs or successors, Kings of this realm, that, in all and every such case or cases, the party grieved, as before is said, shall or may appeal from any of the said courts of this realm, where the said matter now being in contention, or hereafter shall come in contention, touching the King, His heirs or successors, as is aforesaid, shall happen to be ventilate, commenced, or begun, to the spiritual prelates and other abbots and priors of the upper house, assembled and convocate by the King's writ in the convocation being or next ensuing within the province or provinces where the same matter of contention is or shall be begun; so that every such appeal be taken by the party grieved within fifteen days next after the judgment or sentence thereupon given, or to be given. And that whatsoever be done, or shall be done, and affirmed, determined, decreed, and adjudged by the foresaid prelates, abbots, and priors of the upper house of the said convocation, as is aforesaid, appertaining, concerning, or belonging to the King, His heirs and successors, in any of these foresaid causes of appeals, shall stand and be taken for a final decree, sentence, judgment, definition, and determination, and the same matter, so determined, never after to come in question and debate, to be examined in any other court or courts: And, if it shall happen any person or persons hereafter to pursue or provoke any appeal contrary to the effect of this act, or refuse to obey, execute, and observe all things comprised within the same, concerning the said appeals, provocations, and other foreign processes, to be sued out of this realm for any the causes aforesaid, that then every such person or persons so doing, refusing, or offending, contrary to the true meaning of this act, their procurers, fanctors, advocates, counsellors, and abettors, and every of them, shall incur into the pains, forfeitures, and penalties ordained and provided in the said statute made in the said sixteenth year of King Richard 2, and with like process to be made against the said offenders as in the same statute made in the said sixteenth year more plainly appeareth."

(a) In the edition of the statutes printed by command of His Majesty King George 3, in pur-

- *118] spiritual causes : and its *effect was, to give, in relation to all spiritual causes, an appeal, where the subject alone was concerned,
 *119] from the *bishop to the archbishop, from the archbishop to the court of delegates, and from the court of delegates to the upper house of convocation.

suance of an address of the house of commons, the 25 Hen. 8, c. 19, stands thus:—"An Act for the Submission of the Clergy to the King's Majesty."—"Where the King's humble and obedient subjects, the clergy of this realm of England, have not only knowledge, according to the truth, that the convocations of the same clergy is, always hath been, and ought to be, assembled only by the King's writ, but also submitting themselves to the King's majesty, have promised, *in verbo sacerdotii*, that they will never from henceforth presume to attempt, allege, claim, or put in ure, or enact, promulge, or execute, any new canons, constitutions, ordinance provincial, or other, or by whatsoever other name they shall be called, in the convocation, unless the King's most royal assent and licence may to them be had, to make, promulge, and execute the same, and that His majesty do give His most royal assent and authority in that behalf: And where divers constitutions, ordinances, and canons, provincial or synodal, which heretofore have been enacted, and be thought not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also over much onerous to His highness and His subjects, the said clergy hath most humbly besought the King's highness, that the said constitutions and canons may be committed to the examination and judgment of His highness, and of thirty-two persons of the King's subjects, whereof sixteen to be of the upper and nether house of the parliament of the temporality, and the other sixteen to be of the clergy of this realm, and all the said thirty-two persons to be chosen and appointed by the King's majesty; and that such of the said constitutions and canons as shall be thought and determined by the said thirty-two persons, or the more part of them, worthy to be abrogated and annulled, shall be abolite and made of no value accordingly; and such other of the same constitutions and canons as by the said thirty-two, or the more part of them, shall be approved to stand with the laws of God, and consonant to the laws of this realm, shall stand in their full strength and power, the King's most royal assent first had and obtained to the same." Be it therefore now enacted, by authority of this present parliament, according to the said submission and petition of the said clergy, that they, ne any of them, from henceforth shall presume to attempt, allege, claim, or put in ure, any constitutions or ordinances, provincial or synodal, or any other canons; nor shall enact, promulge, or execute any such canons, constitutions, or ordinances provincial, by whatsoever name or names they may be called, in their convocations, in time coming, which always shall be assembled by authority of the King's writ, unless the same clergy may have the King's most royal assent and licence to make, promulge and execute such canons, constitutions, and ordinances, provincial or synodal; upon pain of every one of the said clergy doing contrary to this act, and being thereof convict, to suffer imprisonment, and make fine at the King's will.

2. "And forasmuch as such canons, constitutions, and ordinance as heretofore hath been made by the clergy of this realm, cannot now at the session of this present parliament, by reason of shortness of time, be viewed, examined, and determined by the King's Highness, and thirty-two persons to be chosen and appointed according to the petition of the said clergy, in form above rehearsed: Be it therefore enacted, by authority aforesaid, that the King's Highness shall have power and authority to nominate and assign, at His pleasure, the said thirty-two persons of His subjects, whereof sixteen to be of the clergy, and sixteen to be of the temporality of the upper and nether house of the parliament. And if any of the said thirty-two persons so chosen shall happen to die before their full determination, then His Highness to nominate other from time to time of the said two houses of the parliament, to supply the number of the said thirty-two; and that the same thirty-two, by His Highness so to be named, shall have power and authority to view, search, and examine the said canons, constitutions, and ordinance, provincial and synodal, heretofore made, and such of them as the King's Highness and the said thirty-two, or the more part of them, shall deem and adjudge worthy to be continued, kept, and obeyed, shall be from thenceforth kept, obeyed, and executed within this realm, so that the King's most royal assent under his great seal be first had to the same; and the residue of the said canons, constitutions, and ordinance provincial, which the King's Highness, and the said thirty-two persons, or the more part of them, shall not approve, or deem and judge worthy to be abolite, abrogate, and made frustrate, shall from thenceforth be void and of none effect, and never be put in execution within this realm.

3. "Provided alway, that no canons, constitutions, or ordinances shall be made or put in execution within this realm by authority of the convocation of the clergy, which shall be contrariant

*Three questions arise in the present case,—first, is this a [120
cause touching the crown, or wherein the crown is interested?—
Secondly, if it be, does the appeal lie from the court of the archbishop
to the upper house of convocation, or is that appeal taken away by the
25 H. 8, c. 19?—Thirdly, supposing it to be a matter touching the
crown, and an appeal to lie to the upper house of convocation, and not

or repugnant to the King's prerogative royal, or the customs, laws, or statutes of this realm, anything contained in this act to the contrary hereof notwithstanding.

4. "And be it further enacted, by authority aforesaid, that, from the feast of Easter, which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made out of this realm, or out of any of the King's dominions, to the bishop of Rome, nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning, in any of the courts within this realm, or within any of the King's dominions, of what nature, condition, or quality soever they be of; But that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties grieved, or having cause of appeal, after such manner, form, and condition as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tithes, oblations, and obventions, by a statute thereof made and established sithen the beginning of this present parliament, and according to the form and effect of the said statute, any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding. And for lack of justice at or in any the courts of the archbishops of this realm, or in any the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's court of chancery; and that, upon every such appeal, a commission shall be directed, under the great seal, to such persons as shall be named by the King's Highness, His heirs or successors, like as in case of appeal from the admiral's court, to hear and definitively determine such appeals, and the causes concerning the same; which commissioners, so by the King's Highness, His heirs or successors, to be named or appointed, shall have full power and authority to hear and definitely determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence as the said commissioners shall make and decree, in and upon any such appeal, shall be good and effectual, and also definitive, and no further appeals to be had or made from the said commissioners for the same.

5. "And, if any person or persons, at any time after the said feast of Easter, provoke or sue any manner of appeals, of what nature or condition soever they be of, to the said bishop of Rome, or to the see of Rome, or do procure or execute any manner of process from the see of Rome, or by authority thereof, to the derogation or let of the due execution of this act, or contrary to the same, that then every such person or persons so doing, their aiders, counsellors, and abettors, shall incur and run into the dangers, pains, and penalties contained and limited in the act of provision and *præmunire* made in the sixteenth year of the King's most noble progenitors, King Richard 2, against such as sue to the court of Rome against the King's crown and prerogative royal.

6. "Provided always, that all manner of provocations and appeals hereafter to be had, made, or taken from the jurisdiction of any abbots, priors, and other heads and governors of monasteries, abbeyes, priories, and other houses and places exempt, in such cases as they were wont or might afore the making of this act, by reason of grants or liberties of such places exempt, to have or make immediately any appeal or provocation to the bishop of Rome, otherwise called Pope, or to the see of Rome, that, in all these cases, every person and persons having cause of appeal or provocation, shall, may take and make their appeals and provocations immediately to the King's majesty of this realm, into the court of chancery, in like manner and form as they used afore to do to the see of Rome; which appeals and provocations, so made, shall be definitively determined by authority of the King's commission, in such manner and form as in this act is above mentioned; so that no archbishop or bishop of this realm shall intermit or meddle with any such appeals, otherwise or in any other manner than they might have done afore the making of this act; anything in this act to the contrary thereof notwithstanding.

7. "Provided also, that such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said thirty-two persons, or the more part of them, according to the tenor, form, and effect of this present act."

to the judicial committee of the privy council, is this a case in which prohibition will lie?

3. Upon the last point, it will not be necessary to say much. That prohibition will lie, even after sentence and appeal, so long as anything remains to be done, cannot be doubted. Lord CAMPBELL, in giving the *121] judgment of the Court of Queen's Bench, says : (a) "The *objection is, that Mr. Gorham had no right, by law, to appeal to the Queen in council for the purpose of bringing the case before the judicial committee, and that he could only appeal from the judgment of the Court of Arches to the upper house of convocation. If this objection be well founded in point of law, it does not come too late, and the prohibition ought to be awarded to stay the execution of the sentence; for, on this supposition, the judgment of the Court of Arches against Mr. Gorham remains unreversed, the proceedings before the judicial committee, and before Her Majesty in council, must be considered wholly void, and, the want of jurisdiction appearing on the face of the sentence, advantage may still be taken of the nullity."

1. The 1st section of the 24 H. 8, c. 12, recites the power, pre-eminence, and authority of the King of England, the power, learning, and wisdom of the body spiritual, and the form and manner of government of the estate temporal. The 2d section, after reciting the inconveniences of suing appeals to Rome, proceeds to enact that all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations, and obventions, already commenced, moved, depending, being, happening, or hereafter coming in contention, debate, or question within this realm, whether they concern the King, his heirs and successors, or any other subjects, or resiants within the same, of what degree soever they be, shall be from henceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the King's jurisdiction and authority, and not elsewhere, in such courts temporal and spiritual of the same as the natures, conditions, and qualities of the cases and matters aforesaid in contention, or hereafter happening in contention, shall require, without having any respect to any custom, use, or sufferance, in *122] hindrance, let, or *prejudice of the same, or to any other thing used or suffered to the contrary thereof, by any other manner of person or persons in any manner of wise; any foreign inhibitions, appeals, &c., or impediments of what natures soever, from the see of Rome, &c., to the let or impediment thereof, in any wise notwithstanding. By the 4th section, it is enacted that whosoever procureth from the see of Rome, &c., any appeals, process, sentences, &c., shall incur the forfeiture of *præmunire*. The 5th section enacts, that, "in such cases where heretofore any of the King's subjects or resiants have used to pursue, provoke, or procure any appeal to the see of Rome, and in all other cases of appeals in or for any of the causes aforesaid, they may and shall

from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise, that is to say,—first, from the archdeacon, or his official, if the matter or cause be there begun, to the bishop diocesan of the said see, if in any case any of the parties be grieved.” “And in like wise (s. 6), if it be commenced before the bishop diocesan, or his commissary, from the bishop diocesan, or his commissary, within fifteen days next ensuing the judgment or sentence thereof there given, to the archbishop of the province of Canterbury, if it be within his province, &c.; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts.” “And (s. 7), if the matter or contention for any of the causes aforesaid be, or shall be, commenced, by any of the King’s subjects or resiants, before the archdeacon of any archbishop, or his commissary, then the party grieved shall or may take his appeal, within fifteen days next after judgment or sentence there given, to the Court of the Arches, or Audience, of *the same archbishop or archbishops; and from the said Court of [*123 the Arches, or Audience, within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be definitively and finally determined, without any other or further process or appeal thereupon to be had or sued.” The 8th section provides that suits commenced before an archbishop, shall be determined by him without any further appeal. By these several sections, the appeal lay from the lowest of these courts spiritual, in succession, to the highest; and the decision of the archbishop was final: and that provision was general. Then follows the 9th, which is the important section: it enacts, that, “in case any cause, matter, or contention, now depending for the causes before rehearsed, or any of them, or that hereafter shall come in contention for any of the same causes, in any of the foresaid courts, which hath, doth, shall, or may touch the King, his heirs or successors, Kings of this realm, that, in all and every such case or cases, the party grieved, as before is said, shall or may appeal from any of the said courts of this realm where the said matter now being in contention, or hereafter shall come in contention, touching the King, his heirs or successors (as is aforesaid), shall happen to be ventilate, commenced, or begun, to the spiritual prelates and other abbots and priors of the upper house, assembled and convocate by the King’s writ, in the convocation being, or next ensuing, within the province or provinces where the same matter of contention is or shall be begun; so that every such appeal be taken by the party grieved within fifteen days next after the judgment or sentence thereupon given or to be given; and that whatsoever be done, or shall be done and affirmed, determined, decreed, and adjudged by the foresaid prelates, abbots, and priors of the

*124] upper house of the said convocation, *as is aforesaid, appertaining, concerning, or belonging to the King, his heirs and successors, in any of these foresaid causes of appeals, shall stand and be taken for a final decree, sentence, judgment, definition, and determination, and the same matter, so determined, never after to come in question and debate, to be examined in any other court or courts." No language can be stronger to show that the ultimate appeal must be to the upper house of convocation. In the year following, the statute 25 H. 8, c. 19, passed. That statute is intituled, "The submission of the clergy, and restraint of appeals." The 1st section, reciting that several canons have been prejudicial to the King's prerogative and to the laws and statutes of this realm, provides that the convocation shall be assembled by the King's writ, and that the clergy shall not enact any constitutions or ordinances without the King's assent. Then comes section 3, upon which the question now before the court will mainly turn. It enacts "that, from the Feast of Easter which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made, out of this realm, or out of any of the King's dominions, to the bishop of Rome, nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning, in any of the courts within this realm, or within any of the King's dominions, of what nature, condition, or quality soever they be of; but that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties aggrieved, or having cause of appeal, after such manner, form, and condition, as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tithes, oblations, and obventions, by a statute thereof made and established sithen the beginning of this present parliament.

*125] *and according to the form and effect of the said statute; any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding." By this section, the appeals given by the former act are in all respects extended to all manner of causes spiritual. Section 4 gives an appeal from the archbishop's court to the court of delegates, but leaves untouched the appeal in matters wherein the crown is interested. Section 5 imposes the penalty of *præmunire* for suing appeals to Rome, or executing any process from thence. And the 6th section provides for appeals from places exempt. Unless there be something in the recitals of these acts, or in the historical circumstances of the times, which compels the court to put upon the language of these several clauses a construction different from that which acts of parliament ordinarily receive,—the conclusion they must arrive at is obvious. King Henry, who was professing to restore to the crown its ancient common law rights, after providing for appeals in ordinary matters, proceeds to deal with matters of greater moment; having, no doubt, in view, the establishing a safe and subservient tribunal for dis-

posing of a matter in which he was personally most deeply interested, viz., the divorce of his Queen, Katherine.^(a) The writers upon this subject comprise the highest authorities known to the law: and all lay it down as clear, that this statute is still in force. The Court of Queen's Bench, when this matter was before them, came to the conclusion that the 3d section of the 25 H. 8, c. 19, repealed the 9th section of the 24 H. 8, c. 12, although it is not even referred to therein. Lord CAMPBELL, in giving judgment, says: "The 24 H. 8, c. 12, was passed when Sir Thomas More, a rigid Roman Catholic, was lord chancellor, and when Henry had not yet broken with the see of Rome. Therefore, [*126 it still allows an appeal to the Pope in all spiritual suits; and it was framed upon the principle, that, while all temporal matters which were discussed in the ecclesiastical courts, should be finally determined by courts sitting within the realm, the spiritual jurisdiction which belonged to the Pope, as supreme head of the Western Church, should remain unaffected. Accordingly, this statute is confined to causes about wills, to causes about matrimony and divorce, and to causes about tithes and oblations. Respecting these three classes of causes, it is enacted that the appeal should be from the archdeacon to the bishop, and from the bishop to the archbishop, whose judgment was to be final; cutting off the appeal to Rome, which otherwise would have lain. The 9th section of the act provides, that if, in '*the causes before rehearsed*,' there shall be matter in contention which may touch the King, the party aggrieved shall or may appeal to the spiritual prelates and other abbots and priors of the upper house assembled in convocation, whose determination is to be final. But an appeal from the archbishop's court in a suit upon a *duplex querela*, involving the question whether the clerk presented to a living by the King was of unsound doctrine, would still have gone to Rome. In the following year, Henry, finding that there was no chance of succeeding in his divorce suit with the sanction of the Pope, and being impatient to marry Ann Boleyn, resolved to break with Rome altogether, and, preserving all the tenets of the Roman Catholic faith, to vest in himself the jurisdiction which the Pope had hitherto exercised in England. Sir Thomas More had now resigned the great seal; and it was held by the pliant Lord Audley, who was ready to adopt the new doctrines in religion, or to adhere to the old, as suited his interests. * * * The 25 H. 8, c. 19, put an end to *all [*127 appeals to Rome, in all cases whatsoever, and enacted, by sect. 3, 'that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties grieved' 'after such manner, form, and condition, as is limited' by the former act of parliament; that is to say, from the archdeacon to the bishop, and from the bishop to the archbishop. No exception is introduced respecting causes which touch the King; and,

(a) See the stat. 25 H. 8, c. 22.

on the contrary, the enactment is expressly extended to all causes, of whatever nature they be, and whatever matter they may concern. But all doubt is removed by the following section (4), which creates a new court of appeal for all causes in the ecclesiastical courts. Instead of allowing the decision of the archbishop to be final, as it was by the statute 24 H. 8, c. 12, the legislature now enacted, that, 'for lack of justice at or in any of the courts of the archbishops,' 'it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's court of chancery,' where delegates are to be appointed under the great seal, who are to adjudicate upon the appeal. This appeal is given in all causes in the courts of the archbishops of this realm, as well in the causes of a purely spiritual nature, which might hitherto have been carried to Rome, as in the classes of causes of a temporal nature enumerated in the statute 24 H. 8, c. 12." This, it is submitted, is begging and assuming the whole question. Lord COKE, in his 4th Institute, pages 323, 339, 340, expressly says, that, in causes touching the King, the appeal lies, not to the King in his chancery, but to the upper house of convocation. And the like is laid down in Bacon's Abridgment, title *Courts (Ecclesiastical)*, (B), (a) and in Comyn's Digest, titles *Convocation* (D), and *Prærogative* (D 13). So, in 3 *Bl. Comm. 67, it is *128] said, that, "in case the King himself be party in any of those suits, the appeal does not lie to him in chancery, which would be absurd; but, by the statute of 24 H. 8, c. 12, to all the bishops of the realm assembled in the upper house of convocation." Mr. Justice BLACKSTONE refers also to the 25 H. 8, c. 19, but does not suggest that the law upon this point is in any respect altered thereby." It would manifestly be absurd to appeal to delegates appointed by the King himself. [WILDE, C. J.—Not more absurd than the petition of right.] If the legislature were dealing with that subject at the present day, they would doubtless provide a different remedy. *Day v. Savage*, Hobart, 87, Woodeson's Lectures, vol. I., pp. 76, 77, Ayliffe's Parergon, Chitty's Prerogatives of the Crown, page 56, and Burn's Ecclesiastical Law, title *Appeal*, all contain the same exposition of these statutes.

The judgment of the Court of Queen's Bench is mainly founded upon an erroneous assumption as to the circumstances under which these statutes of Henry the 8th passed. Sir Thomas More ceased to be lord chancellor in May, 1532. Lord Audley succeeded him in the same month as lord-keeper, and was appointed chancellor in the January following: consequently, it was under *his* auspices that *both* statutes passed. [WILDE, C. J.—The first statute appears to have passed in February, 1532.] That will be found, upon examination, to be a mistake. The month of February in the 24th year of Henry the 8th, was in 1533: consequently, the statute in reality passed on the 7th of Feb-

(a) 7th edit. Vol. II. pp. 485, 486 (p. 167, 5th and 6th editions); citing 4 Inst. 339, 340.

ruary, 1533.(a) Before the commencement of the session in which that statute passed, *Henry had already married Ann Boleyn, and Queen Elizabeth was actually born. The marriage with [*129 Ann Boleyn, according to protestant historians, took place in November, 1532; according to the Roman catholic historians, not until February, 1533: but, be that as it may, Elizabeth was certainly born in August, 1533: and the statute 25 H. 8, c. 19, passed in January, 1534.(b)

Three cases, and three cases only, are mentioned in the judgment of the Court of Queen's Bench as authorities for their decision. These were Goodman's case,(c) *Waller v. Heseltine*, 1 Phill. Eccl. Rep. 170, and *Dyke v. Walford*, 3 Moore's P. C. Cas. 434. The first case appears to be this:—The appointment of the Dean of Wells being vested, by act of parliament, in the crown, Edward the Sixth, by his letters-patent, appointed Goodman; and no question appears to have been raised as to the validity of that appointment. Goodman, however, so being dean, having committed some ecclesiastical offence, was sued in the spiritual court of the Bishop of Bath and Wells, and deprived; which sentence of deprivation was confirmed, on appeal to the archbishop. Goodman appealed to the King in chancery, and the delegates, after argument, in like manner confirmed the sentence. Edward thereupon appointed one Turner. Upon the death of Edward, Mary came to the throne; and she issued a fresh commission to delegates, to review the sentence. The new delegates reversed the sentence, and restored Goodman; who enjoyed the deanery until the death of Mary. After the death of Mary, Queen Elizabeth, upon the petition of Turner, issued a new commission to delegates; who removed Goodman, and restored Turner. Another commission was afterwards issued, upon the petition of [*130 *Goodman; but that appeal was fruitless. Afterwards, in the 10th year of the reign of Elizabeth,—and probably when both deans were dead,—questions arose as to the validity of acts done by them (in granting leases) whilst they were respectively in possession of the deanery. The observation which Lord CAMPBELL makes upon this case, is this: "These perplexing questions might have been easily solved by the doctrine that all the proceedings subsequent to the sentence of the archbishop, were null and void, the appeal not having been to the upper house of convocation: but, not a doubt was whispered respecting the appeal having been duly brought to the King in chancery, under the 4th section of stat. 25 H. 8, c. 19: and full effect was given to the sentences pronounced by four successive commissions of delegates, in

(a) See Sir H. Nicholas's *Notitia Historica*. February, 24 H. 8, was in 1533 of the ecclesiastical year, but in 1532 of the civil year (which, until 1751, extended to the 25th of March). It was, therefore, subsequent to May, 1532, which was in 23 H. 8. And see 2 M. & G. 471 (b) (R. C. L. R. vol. 52).

(b) i. e. in January, 1533-4.

(c) *Dyer*, 273 a, *Walton v. Pollard*; *Ib.* 239 a, *Hodgeskins v. Tucker*.

three successive reigns." If the question had been raised there,—which it was not,—it might have been successfully urged that the crown was not interested in the matter at all. The case, therefore, is utterly worthless as an authority, opposed to those already adverted to. The next case,—Waller *v.* Heseltine,—was one in which the question raised, was, whether or not it was too late to object to the propounding of a will. There, no doubt, the crown had an interest. The appeal there, it seems, was to the court of delegates. The objection now urged escaped the attention of the learned counsel who were engaged in that case, as it did in this case during the whole time of the pendency of *this* appeal. The third case,—Dyke *v.* Walford,—arose with reference to the goods of an intestate dying within the Duchy of Lancaster. The appeal there was to the privy council. The same observations apply to that as to the other cases: the point never arose: there was, in truth, no one to raise it,—the Queen being, in effect, both plaintiff and defendant. [WILDE, C. J.—The question arose between the Queen on the one hand, and the *131] consolidated fund on the other.] It would be doing *injustice to the very learned judges who took part in the discussion of these cases, to suppose that the statutes of H. 8 were present to their minds; for, if they had been, they must have mentioned them.

2. The only remaining question is, whether this is a case in which the crown has an interest: and upon that point the Court of Queen's Bench has pronounced no opinion. It is difficult to see how it can be said that the crown is not interested, seeing that the matter to be determined is, whether or not the presentee of the crown is to be admitted to a benefice in the gift of the crown. The presentment is by letters-patent: the Queen undoubtedly has an interest in having her commands obeyed. In another view, the crown has an interest, and a very important interest, in the matter. If the bishop succeed, the sentence of the Court of Arches will stand: and that will be a judgment *in rem*, and will bar the crown from bringing a *quare impedit*: Spickett's case, 5 Co. Rep. 58, 1 Stark. Evid. 3d edit. p. 285, where the whole of the law upon the subject of judgments *in rem*, is elaborately discussed. It is enough if the interest of the crown only comes indirectly into question: Bac. Abr. *Prerogative* (E.) [WILDE, C. J., referred to Rowe *v.* Brenton, 8 B. & C. 737 (E. C. L. R. vol. 15), 3 M. & R. 133, and TALFOURD, J., to Paddock *v.* Forrester, 1 Scott, N. R. 391, 1 M. & G. 583.] Upon a motion for a prohibition, where there is any reasonable doubt, the practice is, to allow the party to declare in prohibition: St. John's College *v.* Toddington, 1 Burr. 198, 199. Neither property, nor liberty, nor life will be safe, if the law of the land is to be set at nought, without argument, on a mere *132] rule to show cause.(a) *Cur. adv. vult.*

*WILDE, C. J., now delivered the opinion of the court.

(a) Reference was also made to the Irish act of 28 H. 8, c. 6, intituled "an act of appeals; and also to the 28 G. 3, c. 32. The provisions of these acts were as follows:—

"Where divers good and wholesome laws and statutes be made and established within the

*In the last term, this court was moved, on behalf of the Lord [*133 Bishop of Exeter, for a rule to show cause *why a writ of prohibition should not issue, to be directed to The Right Honourable [*134 Sir HERBERT JENNER FUST, Knight, the Dean of the Arches, to prohibit

realm of England for the annulling, and utter taking away of appeals in cases spiritual from the bishop of Rome and see apostolic, and such other as claim by authority of the same, not only for great speed of justice to the King's subjects of the said realm, but also in taking away the long delays, costs, charges, and expenses that the said subjects sustained by reason of such appeals; and forasmuch as this land of Ireland is the King's proper dominion of England, and united, knit, and belonging to the imperial crown of the same realm, which crown of itself and by itself is fully, wholly, entirely, and rightfully endowed and garnished with all power, authority, and pre-eminence, sufficient to yield and render to all and singular subjects of the same full and plenary remedies in all causes of strife, debate, contention, or division, without any suit, provocation, appeal, or any other process to be had, made, or sued to any foreign prince or potentate, spiritual or temporal: Be it, therefore, and for the common weal of the subjects of this land, ordained and enacted, by authority of this present parliament, that no person or persons, subjects or residents of this land, shall, from the first day of this present parliament, pursue, commence, use, or exercise any manner of provocations, appeals, or other process, to or from the bishop of Rome, or from the see of Rome, or to or from any other that claim authority by reason of the same, for any manner of case, grief, or cause, of what nature soever it be, upon the pain that the offenders, their aidors, counsellors, and abettors, contrary to this act, shall incur and run into such paines, forfeitures, and penalties, as be specified and contained in the act of provision and *præmunire*, made in the realm of England in the sixteenth year of King Richard 2, sometime King of England and lord of Ireland, against such as procure to the court of Rome, or elsewhere, to the derogation, or contrary to the prerogative or jurisdiction of the said crown of England; and that no manner of person, subject or resident within this said land, shall attempt, procure, or obtain any manner of process, of what kind or nature soever it be, to or from the same bishop of Rome, or court of Rome, or see apostolic, or from any other having authority by the same, to the let or interruption of this act, or anything therein contained, nor in anywise obey or execute within this land such manner of process, upon like paines and forfeits as been above rehearsed.

2. "And to the intent that the subjects and residents of this land shall and may take and hear the appeals in their just and lawful causes, for lack of justice within this land, be it further enacted, by authority of this present parliament, that, in and for all manner of causes, griefs, and cases, as they or any of them were wont and accustomed to have in their provocations, appeals, and other process, in cases of debate and contention, to or from the bishop of Rome, or to or from the see apostolic, or court of Rome, they now, being grieved, shall have, take, and use, from the first day of this present parliament, their provocations, appeals, and such like process, to the King of England and lord of Ireland, His heirs and successors, or to His or their lieutenant, deputy, justice, or other governor, whatsoever he be, of this land of Ireland for the time being, to His or their court of chancery within the same realm of England or land of Ireland; and that, upon every such provocation, appeal, and process, made to the King of England and lord of Ireland, and to His heirs and successors, the chancellor of England, or keeper of the great seal for the time being, shall grant a commission or delegacy to some discreet and well-learned persons of this land of Ireland, or else in the realm of England, for final determination of all causes and griefs contained in the said provocations and appeals, and in the principal matter, and in all circumstances and dependant thereupon; and that, upon every such provocation, appeal, or process made to the said lieutenant, deputy, justice, or governor, the chancellor of this said land of Ireland, or keeper of the great seal of the same for the time being, by the assent of the Chief Justices of the King's Bench and Common Place, the Master of the Rolls, and the under-treasurer of the said land for the time being, or any two of them, so as the said under-treasurer be one, shall grant a commission or delegacy to some discreet and well-learned persons within this land of Ireland, for final determination of all causes and griefs contained in the said provocation and appeals, and in the principal matter, and all circumstances and dependants thereupon; which commissioners so named shall have like power and authority in all manner of things as commissioners assigned in appeals made to the King's highness in the realm of England have, by authority of their commission, or by virtue of any acts made for appeals within the said realm; any foreign laws, prohibitions, inhibitions, from the court of Rome, customs, usages, prescription, or any other things to the contrary thereof notwithstanding."

"An act to repeal an act passed in the twenty-eighth year of the reign of King Henry 8 (23

*135] him *from instituting and inducting the Rev. George Cornelius Gorham to the vicarage and parish church of Brampford-Speke, in the county of Devon, or otherwise executing a certain order of the Queen in council made in that respect.

This motion was founded upon an affidavit which stated that the Queen is the patroness of the vicarage of Brampford-Speke, in the county of Devon; that Her Majesty duly presented the said George Cornelius Gorham to the said vicarage; that the bishop proceeded to examine the said G. C. Gorham as to his fitness and qualifications for admission, as well in relation to his faith and doctrine, as to his learning, morals, ability, and sufficiency, according to the laws ecclesiastical of this realm; that the bishop determined that the said G. C. Gorham did hold doctrines and opinions contrary to the true Christian faith, and contrary to, and inconsistent with, the doctrines of the Church of England, the thirty-nine articles, and the book of common prayer enjoined by the act of uniformity made and passed in the thirteenth and fourteenth years of the reign of King Charles the Second,(a) and that, by reason thereof, the bishop had refused to admit and institute the said G. C. Gorham to the said vicarage; that the said G. C. Gorham had instituted a *duplex querela* in the Arches Court of Canterbury, and that the judge of that court had adjudged and determined that the said G. C. Gorham did hold such unsound doctrines and opinions, and was therefore, as had been imputed to him, unfit to be admitted, instituted, and inducted into the

G. 3, c. 32 (Irish)), entitled 'An Act of Appeals,' and to enable the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of this kingdom for the time being, to issue Commissions of Appeal from the Courts of the Archbishop within the same."

"Whereas it is expedient that an act passed in this kingdom in the twenty-eighth year of the reign of King Henry 8, entitled 'An Act of Appeals,' should be repealed, and that provision should be made for issuing commissions of appeal from the courts of the archbishops of this realm: Be it enacted, &c., that the said recited act be, and the same is hereby repealed: and, for lack of justice at or in any the courts of the archbishops of this realm,

2. "Be it enacted by the authority aforesaid, that it shall and may be lawful for the parties grieved, to appeal to the King's majesty, His heirs and successors, and that, upon every such appeal, a commission shall be directed, under the great seal of this kingdom, to such persons as shall be named by the King's most excellent majesty, His heirs or successors, in His or their said court of chancery, to hear, and definitely determine, such appeals, and the causes concerning the same, and in such form as hath been used in this realm on appeals to the King's majesty in His said court of chancery: which commissioners so by the King's most excellent majesty, His heirs or successors, to be named or appointed, shall have full power and authority to hear and definitely determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence as the said commissioners shall make and decree in and upon any such appeal, shall be good and effectual, and also definitive, and no further appeals to be had or made from the said commissioners for the same; and, if any person or persons, at any time after the passing of this act, shall provoke or sue any manner of appeals, of what nature or condition soever they be, to the derogation or let of the due execution of this act, or contrary to the same, every such person or persons so doing, their aiders, counsellors, and abettors, shall incur the pains and penalties of *præmunire*, specified and contained in the act made in the realm of England, in the sixteenth year of the reign of King Richard 2, against such as sue to the court of Rome against the King's crown and prerogative royal.

3. "And be it declared and enacted, by the authority aforesaid, that all commissions which have heretofore issued upon appeals to the King's Majesty, or His predecessors, in His or their court of chancery of this realm, and all proceedings had under and by virtue of the same, shall be deemed valid and effectual, to all intents and purposes whatsoever."

(a) 13 & 14 Car. 2, c. 4.

said vicarage, and that the said suit was therefore dismissed, with costs; that, thereupon, the said G. C. Gorham had appealed to Her Majesty in council, and that Her Majesty had been pleased to refer the petition to the *judicial committee of Her privy council; and that the said judicial committee had reported to Her Majesty that the said judgment ought to be reversed, and that no sufficient cause had been shown why the said G. C. Gorham should not be admitted, instituted, and inducted, and that the cause ought to be remitted, that justice might be administered in that behalf; and, further, that Her Majesty, by an order in council, had ordered and directed that the report should be observed and carried into execution; that the cause had been remitted accordingly; that the official principal of the Arches court was proceeding to carry the report and recommendation into execution; that the bishop had been served with a monition to return the letters-patent of presentation of the said G. C. Gorham to the Arches court; that the said G. C. Gorham would be admitted, instituted, and inducted by the Archbishop of Canterbury, unless prevented by prohibition from this court; that the bishop was advised that Her Majesty had no authority to refer the petition to the judicial committee of the privy council, and that the judicial committee had no power to consider the matter thereof, or make any report or recommendation thereon, and that Her Majesty had no power to make the order in council, and that the Archbishop of Canterbury has no power, either by himself, or to authorize any other, to admit, institute, and induct the said G. C. Gorham; that the judgment of the said Dean of the Arches is still in force and effect as a valid judgment; and that the bishop was not aware that the said G. C. Gorham was not entitled to appeal as before said. [*136]

Such are the facts set forth in the affidavits: and the grounds upon which prohibition is prayed, are, that no appeal against the judgment of the Dean of the Arches in this case lay to the Queen in council, or in other words, to the judicial committee of the privy council; *but that an appeal from the judgment of the dean of the Arches [*137] could only be made to the upper house of convocation.

This question depends upon the construction of a statute made and passed in the 25th year of the reign of King Henry the Eighth,^(a) which statute must be construed in connexion with the 24 H. 8, c. 12.

By the statute 24 H. 8, c. 12, s. 2, appeals from the ecclesiastical courts of this kingdom were prohibited to be made to Rome, in the classes of causes there mentioned, and were required to be made to the tribunals of the realm, as therein stated: and by section 9, it was enacted, that, in case any cause within the classes of causes therein mentioned should touch the King, the party grieved should appeal from any of the courts mentioned to the upper house of convocation; and the determination of the said upper house appertaining to the King, should

(a) 25 H. 8, c. 19. Supra, 116 (a).

be taken for a final decree, never after to come in question to be debated or examined in any other court or courts.

By the 25 H. 8, c. 19, intituled "The submission of the clergy, and restraint of appeals," it is enacted (in s. 3), that, after the day therein named, no manner of appeals should be made out of the realm, in any causes or matters having their commencement in any court within the realm, *of what nature, condition, or quality soever*; but that all manner of appeals, of what nature or condition soever they should be of, and what cause or matter soever they concern, should be made and had *after such manner, form, and condition as was limited to appeals in the causes mentioned in the said statute of the 24 H. 8*, and according to the form and effect of that statute. By s. 4, it is enacted, that, for lack of justice *188] at, or in the courts of the archbishops of this realm, or *in any of the King's dominions, it should be lawful for the parties to appeal to the King in chancery, and that a commission should thereupon issue to certain persons to hear and determine the same, and whose determination should be definitive, and no further appeal should be had. By s. 6, all appeals thereafter to be had or taken from abbots, priors, &c., of houses and places exempt, in such cases as they might aforesometimes make immediate appeal to the Pope, in all such cases the parties should have their appeal to the King in chancery, in like manner and form as before was used to the see of Rome.

The present application does not relate to a cause within either of the enumerated classes of causes in the statute of 24 H. 8, but refers to an appeal prescribed and regulated by the statute of the 25 H. 8; and such application mainly depends upon the construction of such latter mentioned statute: and two principal questions occur to be considered,—first, whether the 9th section of the statute of 24 H. 8, which enacts, that, in any cause within either of the enumerated classes of causes, which shall touch the King, the appeal shall be made to the upper house of convocation, is to be deemed to be incorporated in, or to control, the statute of 25 H. 8; and, if it shall be found that such is the correct construction of the statute of the 25 H. 8, then a second question will arise, viz. whether this is a case which touches the Queen.

In considering the question whether the 9th section of the statute of 24 H. 8 ought to be deemed to be incorporated in, and to control, the statute of 25 H. 8, it is to be observed, that, where it was intended by the statute of 24 H. 8 to make a distinction in the course to be pursued in appeals in causes which should touch the King, from that which was to be pursued in all others, it was done in express terms by the 9th section of that statute; and *that* provision,—with whatever *189] *view or motive it was adopted,—could not have been out of mind on the framing of the statute of 25 Hen. 8.

Further, it is to be noted, that the 3d section of the 25 H. 8, c. 19, is altogether general or universal in its terms; such terms being, "that

all manner of appeals, of what nature or condition they should be, or what cause or matter soever they should concern, should be made after such manner, form, and condition as had been limited for appeals in the causes mentioned in the 24 H. 8, and according to the form and effect of that statute." The words of this section which are relied upon as having the effect of incorporating, by implication, that which had been enacted by distinct expression in the former statute, viz. the appeal to the convocation, in matters which touched the King, are the following,—“after such manner, form, and condition as is limited for appeals to be had and prosecuted, by the statute of 24 H. 8.” It is, therefore, to be ascertained, first, what was the “manner and form” limited for appeals by the statute of 24 H. 8.

These words “manner and form,” found in the 5th section, in limiting the appeals, are thus used,—“they (that is the parties to, whom the appeal has been given) shall and may from thenceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, that is to say,” &c. The statute then proceeds to state, in substance, that all appeals from the archdeacon are to be made to the bishop; and, if commenced before the bishop, then, within fifteen days, to the archbishop, and there to be definitively adjudged; and, if commenced before the archdeacon, or commissary of any archbishop, then, within fifteen days, to the Court of the Arches, or Audience, of the archbishop, and from the Court of Arches to the archbishop, there to be definitively determined.

These provisions are inserted in the printed statute *as three sections; but they are, in truth, parts of the 5th section, and [*140 indicate the respective modes of appeal, and the times within which the appeals referred to in the 5th section were to be respectively made.

In a subsequent section, preceded by distinct words of enactment, is a provision “that any cause within the enumerated classes, which should be commenced before an archbishop, should be finally determined there.” Then follows the 9th section,—also preceded by express and distinct words of enactment,—in which an appeal is given to the convocation, in causes in which the King is touched.

The manner and form mentioned in the statute of the 24 H. 8 would not appear to have reference to the appeal given in suits which touched the King.

The word “condition” remains to be considered.

This word “condition” is to be found also in the statute of the 24 H. 8; and a reference to that statute for its meaning,—proper in any case, as being the language of a statute *in pari materia*,—becomes the more appropriate on this occasion, as the statutes are ancient, and the language not that of modern legislation.

The 2d section of that statute, after enacting that the causes therein mentioned should be determined within the King’s jurisdiction, and not

elsewhere, proceeds to state that the same shall be determined in such courts spiritual and temporal as the natures, "conditions," and qualities of the cases and matters should require. The word "condition" there is not used in the more common modern sense of "restriction" or "qualification," but in that of "character," "state," or "quality:" and the object of its introduction is obviously rather to amplify than qualify the other language. And so here, we think that the word "condition" in this 3d section of the 25 H. 8 had reference to the character and nature *141] of the causes to which the *enactment was directed, and did not point at any restriction or exception in the case of the crown.

It would seem, therefore, that the words "manner, form, and condition," in the 3d section of the 25 H. 8, were intended to incorporate the manner of proceeding in appeals in general indicated by the former statute, both as to time and other circumstances, but not to re-enact a particular provision in that statute distinct from the general manner and form of appeals, to which those words made no particular reference.

At any rate the words may be thus construed: it is a construction which satisfies, if it does not exhaust, them: and, in such a case, it may be doubted whether we are at liberty to give them a larger signification, in conformity with the rule of law which requires that the crown should be touched, if at all, by express words.

But this is a question we are not called upon to decide; for, in our opinion, the section which follows, explained by the usage in several cases, precludes any reasonable doubt.

The 4th section enacts, in general terms, that, "for lack of justice in any of the courts of the archbishops," it should be lawful for the parties aggrieved to appeal to the King in chancery; whereupon the commission therein mentioned was to issue, to determine the same. There seems no ground to authorize a court of law, in construing this section, to engraft so important a restriction or condition in it as that contended for,—there being nothing ambiguous in the language of the section itself, nor any reference to matter extrinsic, from which such an intention can reasonably be implied. To adopt the construction contended for, would be, to decide that an enactment distinct and without exception in itself, is to be controlled and limited by the more than doubtful implication to be drawn from a previous section; and this in respect of the crown, *142] whose *prerogatives, it is said, are not to be affected by general words or intendment.

There are some other considerations which throw light on this conclusion.

The 6th section provides that appeals from the jurisdiction of abbots, priors, and other heads of monasteries, and governors of other houses and places exempt, which before the statute might be made immediately to Rome, should thereafter be made to the King in chancery, in like manner as they had been used before to be made to the see of Rome;

such appeals to be determined by the like commission as before mentioned. This section is also free from any exception, in appeals touching the King: and it does not seem reasonable to suppose, that, if appeals to the convocation were to be made in cases touching the King, under the 3d and 4th sections, they would not have been equally applied to appeals referred to in the 6th section.

It thus appears to the court that the true construction of the statute 25 H. 8, c. 19, which applies to the appeal that has been made in this case, is, that appeals in all cases under that statute may be made to the Queen in council, whether the cause in which such appeal may arise, shall or shall not touch the crown; and that, therefore, under the authority of the subsequent statute,^(a) the appeal was properly referred to the judicial committee of the privy council.

In order to estimate the weight which ought to be given to the arguments and authorities which have been presented to our consideration, in support of a different construction, we have thought it right to ascertain by what construction appeals have been regulated, since the passing of the statutes, in causes touching the crown. And we find that the course and practice has been uniform, that appeals in causes touching the crown *have been made to the King in chancery, or King [*143 in council, and determined by the court of delegates. And, after due inquiry and investigation, no instance has been discovered of an appeal in such cases to the convocation. And the report made to us,^(b) that no such instance can be found, derives great confirmation from the circumstance that, notwithstanding the great interest this case has excited, and the great ability and industry that have been exercised in the course of its prosecution, the applicant's counsel have not suggested that any instance has occurred of such appeal to the convocation.

The several cases of appeals to the delegates are proper to be adverted to.

There is a case of *The King v. Pigeon*, which was an appeal by the King's proctor, on behalf of the crown, to the delegates, and in which, on the 22d of May, 1677, sentence was given. The appeal was heard before WILD, then a judge of the Queen's Bench, ATKINS, a baron of the Exchequer, and five civilians. It appears that there was a sentence remitting the cause,—the King's proctor dissenting.

The case of *The King v. Elbow* was heard in February and March, 1696, before TREBY, chief justice of the King's Bench, ROKEBY and TURTON, judges of the Common Pleas, OXENDON, judge of the Arches court, HEDGES, judge of the Admiralty, and three civilians. The crown claimed to be entitled to the property of the deceased, upon the ground of his having died a bachelor, without having kin. One party claimed

(a) 2 & 3 W. 4, c. 92, s. 3, and 3 & 4 W. 4, c. 41, s. 3.

(b) By Master Griffith.

under a nuncupative will, and another party claimed under a written will. The decision of the Prerogative court was in favour of the written will. The King appealed from that judgment. The case was heard *144] before the delegates, who also pronounced for the written will, and affirmed the sentence of the Prerogative court.

The case of *The King v. Turke* and others was heard on the 3d of February, 1695-6, before Sir William Ellis, knight, and four civilians. The crown in this case also claimed the goods of an intestate, upon the absence of kin. The cause had been heard before Sir LEOLINE JENKINS, the judge of the Prerogative court. The King's proctor appealed from the sentence to the delegates; all parties appeared, without objection to the jurisdiction. The case was heard before the delegates; but the crown did not appear at the hearing: and the sentence was affirmed.

The case of *The King v. Weedon and Shales* was heard on the 5th of March, 1697, before the chief justice of the King's Bench, a judge of the King's Bench, and a judge of the Common Pleas, the Official Principal of the Arches court, the judge of the Admiralty, and three civilians. The case related to the effects of Francis Le Peyra, who was a native of France, but who died in London, having left a will bequeathing various legacies to alien enemies, and appointed his brother, John Le Peyra, sole executor and residuary legatee; and, in case of his death before the will should be executed, he appointed Weedon and Shales executors. The crown claimed that administration should be granted to its nominee, by reason that John Le Peyra, who had been appointed executor and residuary legatee, and the other legatees, were all alien enemies. Weedon and Shales appeared, and prayed for probate to be granted to them; and the judge of the Prerogative court decreed administration with the will annexed to be granted to Weedon and Shales. The King's proctor appealed to the King in chancery, and the case was heard by commission, before the delegates, who pronounced for the ap- *145] peal, and condemned Weedon and Shales to 20*l.* expenses. John Le Peyra died before the will was executed; whereupon probate was decreed by the judge to Weedon and Shales, the executors.

In the case of *Waller and Smyth v. Heseltine and Burgh*, 1 Phillimore, 170, the crown claimed the goods, upon the ground that Newport had died intestate, and was a bastard. One party propounded a will, and claimed as executors; another party claimed as next of kin, on the ground of intestacy. The crown claimed to suspend the proceedings as between it and the next of kin, until the suit between the next of kin and the executors should be determined. The court ordered the proceedings to go on *in pari passu*. The case was afterwards heard before Sir WILLIAM WYNN, the judge of the Prerogative court, on the 4th of December, 1792, when he decreed letters of administration to Waller and Smyth, surviving executors of James Smyth, one of the next of kin of the deceased. The King's proctor appealed to the delegates: the parties

appeared, without objection, to the jurisdiction. The usual libel of appeal and process were brought in; and an allegation was afterwards brought in by the King's proctor, in support of the claim of the crown. The delegates, at the prayer of the respondents, affirmed the sentence, and remitted the cause; the King's proctor not appearing, and having, on the 20th of July, 1797, declined further to prosecute the appeal. The delegates were Mr. Baron THOMPSON and certain civilians.

There is another case, to which reference should be made. That is the case of *Walrond v. Pollard, Dyer, 273 a*, which has been referred to by the name of Goodman's case. In that case, the crown had nominated Goodman dean of the cathedral church of Wells, who afterwards *accepted the prebend of Wyveliscombe in the same church, and in consequence was subsequently deprived of the deanery by the [*146 bishop, by virtue of the King's letters-patent of visitation of the dean and chapter there. Goodman appealed from that sentence to the archbishop of Canterbury, who affirmed the sentence of deprivation; and, in consequence, Goodman appealed to the King; and the two previous sentences were affirmed,—and, of course, under a commission of delegates. In the reign of Mary, a commission at the suit of Goodman was granted to four delegates, who reversed the two sentences which had been pronounced, and restored Goodman. Turner,—who had been appointed to the deanery by King Edward the Sixth, upon the deprivation of Goodman, and who had himself been deprived by the subsequent sentence of the delegates in the reign of Mary,—in the reign of Elizabeth obtained a new commission to delegates; and, under that commission, the sentence by which Goodman had been restored was reversed, and Turner was restored. Subsequently, upon the petition of Goodman, a further commission was granted to other delegates, who affirmed the last preceding sentence; after which, Goodman died. It appeared that Goodman had granted certain leases: and two questions arose in the cause,—first, whether Goodman was dean at the time he granted the leases,—secondly, whether the leases required confirmation by the King. It has been said that the case is not perfectly intelligible; and it may be so in certain respects: but, whatever ambiguity may appear in respect of some parts of the case, there is none in regard to the facts which have any bearing upon the present case: and they are—that the crown was the patron of the deanery, and had appointed Goodman; and that, upon his, Goodman's, being deprived, he appealed to the archbishop, and afterwards from the archbishop to the King, upon which appeal *the sentences of deprivation were affirmed; which affirmation [*147 must, of course, have been by delegates. There were also three subsequent appeals against the sentence of deprivation, and all to delegates. The first appeal was in the reign of Edward the Sixth,—a period very proximate to the passing of the statutes in question. The second was in the time of Mary,—during whose reign the statutes of 24 H. 8, c. 12, and

25 H. 8, c. 19, did not exist. (a) And the third and fourth appeals were in the reign of Elizabeth,—in the first year of whose reign the statutes in question were re-enacted and revived. (b) And this case must have occurred soon after the revival of those statutes. And the case itself, containing the statement of those appeals to the delegates, is reported by Lord Chief Justice DYER, to whose authority Lord COKE refers in his Fourth Institute, which has been cited, and who became chief justice about the time the reviving statute passed,—having been a judge some years before. The first reported case, therefore, which has any relation to the question, must have occurred some time before the 10th of Elizabeth, and the last case, in the year 1792.

The cases referred to,—excepting Goodman's case,—it will be observed, all occurred in causes testamentary; being a large class named in the statute of 24 H. 8, c. 12; and yet the appeals, being made after the 25 H. 8, c. 19, were made to the delegates, and not to the convocation. This course clearly would not have been pursued, if the 9th section of the 24 H. 8 had been deemed to be in force, to the exclusion of the appeal given, by the statute 25 H. 8, c. 19, to the King in chancery: and, if such was the construction in relation to the enumerated causes in the statute 24 H. 8, *à fortiori* the appeal in the present case to the delegates, which is under the statute of 25 H. 8, is free from objection.

*148] *All the cases which have been named, except the last, reported in 1 Phillimore, 170, occurred when the court of the convocation was in more active operation than it has been in modern times, and were heard before eminent judges: and it cannot reasonably be doubted that reference must have been had to the statutes in question, and their true construction considered; and that either no doubt was entertained that the appeals to the delegates were well founded, even though the crown was touched by them, or that the construction must have been discussed and determined upon judicially. In either view, they are consistent with the construction now adopted by the court, and inconsistent with any other.

In the case which is reported in 1 Phillimore, 170, Sir William Scott was the King's advocate who appealed on his behalf,—one of the last persons likely to have prosecuted an appeal on behalf of the crown to a wrong tribunal, or to have been unacquainted with the statutes in question.

In support of the present application, in addition to the arguments offered upon the construction of the statutes, it was stated that there was a succession of authority in text-books, truly said to be of great authority: but it will appear, in fact, that all the passages cited subsequently to the time of Lord COKE, are referable to the single authority of the Fourth Institute; and most, if not all, of them expressly refer to it. And it appears to us, that the effect of the several passages

(a) Repealed 1 & 2 P. & M. c. 8.

(b) 1 Eliz. c. 1.

quoted has not been correctly appreciated; and that, upon due examination they will not be found entitled to the reliance which has been placed upon them. It is necessary, therefore, accurately to examine the effect of the passages in the Fourth Institute: and it will appear that Lord COKE detailed successively the provisions of two several acts of parliament; and what Lord *COKE has stated as the provisions of one statute, the subsequent text-writers have adopted as the [*149 joint result of both statutes,—a result upon which Lord COKE himself expressed no opinion.

There are several passages in the Fourth Institute relevant to this subject.

The first is to be found in Cap. 74, p. 323, under the head of "*Courts of Convocation*." In the margin, the 24 H. 8, c. 12, and 1 Eliz. c. 1, are noted; and, opposite to these statutes, and plainly only referring to them, the text states,—“If any cause shall depend in contention in any ecclesiastical court, which may or shall touch the King, the party grieved shall or may appeal to the upper house of convocation.” And it is to be observed that this passage, which refers to the 24 H. 8, c. 12, inaccurately states, that, by that statute, if *any cause* shall depend, touching the King, appeal shall be to the upper house of convocation; whereas, that statute applies only to certain classes of causes there enumerated. The 1 Eliz. c. 1, is only referred to, because it repealed a repealing statute passed in the reign of Philip and Mary, and revived the 24 H. 8, c. 12, and 25 H. 8, c. 19, and other statutes.

In p. 337 of the Fourth Institute, under the title of "*The Court of the Arches of the Archbishop of Canterbury*," after speaking of the judge of the court, the text states,—“He hath ordinary jurisdiction in spiritual causes in the first instance, and, by appeal, through the whole province of Canterbury, as it appeareth by the statute of 24 H. 8, c. 12. And from this court of the Arches the appeal is to the King in chancery, by the said act of the 25 H. 8.” It is to be observed, that, in this passage, which refers, not to one of the statutes only, but to both, the appeal is stated to be to the King in chancery, in general terms, and not as subject to any restriction to cases that touch the King.

*In page 339, under the head of "*The Court of Delegates, and consequently of appeals*," there is noted in the margin the [*150 statute of 25 H. 8, c. 19; and the text opposite states that “the court sits upon appeals to the King in chancery in three causes,—first, when sentence is given in any ecclesiastical cause by the archbishop or his official,—secondly, when any sentence is given in any ecclesiastical cause in places exempt,—thirdly, when a sentence is given in the Admiralty court.” Thus, the three classes of causes are treated as subject to the same appeal, with no exception; it being quite obvious that the second and third classes have no relation to the court of convocation.

In another passage in p. 339, Lord COKE states, “that, as appeals

are grounded upon acts of parliament, it will be pertinent to set down the resolution of the judges, and of *the learned in ecclesiastical law*, which doth sum up in what causes, from what courts, and in what time, appeals are to be made, and other necessary incidents concerning the same, as the Lord DYER, under his own hand, hath reported." And, after this passage, and under the head of "*Appeals*," is noted in the margin the statute of 24 H. 8, c. 12, and "that in causes testamentary, &c., appeals from the archdeacon shall be to the bishop, and from the bishop to the archbishop, and no further," and proceeds, under the word "*Item*," "from the archdeacon or commissary of the archbishop, to the arches, &c." Opposite to this passage, in the margin, are the words "See *infra*. This is altered by the statute of 25 H. 8, in the next page." Then follows—"Item, where the matter toucheth the King, the appeal is to be made to the higher convocation house of that province, and no further, to be finally there determined." Then again is quoted in the margin the 25 H. 8, c. 19: and, opposite to that quotation, in *151] the text, are the words, "A general prohibition that no appeals *shall be pursued out of the realm, to Rome or elsewhere. *Item*. A general clause, that all manner of appeals, what matter soever they concern, shall be made in such manner, form, and condition within the realm, as it is above ordered by the 24 H. 8, in the three causes aforesaid, viz. from the archbishop's court to the King in his chancery, where a commission shall be awarded for the determination of the said appeal; and from thence no further." And, again, in the margin is a note—"See the page precedent." "*Item*. That persons exempt shall likewise pursue their appeal in the chancery, *ut supra*, and not to the archbishop." The author here has merely been setting down the effect of the statutes, in succession: and, when he speaks of appeals to the convocation, it is under the head of the statute of the 24 H. 8.

It was not understood, when the motion was made, that the passages then read referred to particular statutes noted in the margin: and, in fact, there is no passage to be found importing that an appeal to the convocation is given in any case whatever under the 25 H. 8, c. 19.

Such are, it is believed, all the passages in the Fourth Institute which have any relation to this subject.

The next authority referred to was Bacon's Abridgment,^(a) "Of appealing from an inferior to a superior court." It is there said, that, "by the 24 H. 8, c. 12, from the archdeacon's court, the appeal is to the bishop: but, when the cause is commenced before an archdeacon, or any archbishop, or his commissary, the appeal is to the Court of Arches." It is then stated, that, "by the 25 H. 8, c. 19, the appeal from the Prerogative court is to the King in chancery, who appoints delegates, by commission, to hear and determine the appeals." "And

(a) Title *Ecclesiastical Courts* (B).

it seems by the said statute, that an appeal from the *Arches is to be to the King in chancery." There is a reference in this [*152 last paragraph to the margin, in which there is a note stating, "that, by the 24 H. 8, c. 12, such appeal is to be to the archbishop; and so is the Fourth Institute, 341." The text then proceeds thus:—Also, by the 25 H. 8, c. 19, appeals of the court of peculiars, or places exempt, shall be henceforth into the chancery. If the matter concerns the King, the appeal must be to the higher house of convocation." In the margin is quoted as the authority for this statement, 4 Inst. 339, 340, which, as has been before observed, does not purport to be an authority that appeals under the 25 H. 8, c. 19, touching the King, are to the convocation, but rather the contrary: and in Bacon's Abridgment, in the passage previous to the statement referred to, when speaking expressly of the 25 H. 8, c. 19, it is said, without qualification—"The appeal from the Prerogative court is said to be to the King in chancery:" and, under the head of the "*Court of Delegates*," there is a paragraph setting forth the 4th section of the 25 H. 8, c. 19, in terms, without any qualification whatever in regard to the appeal there given, from the archbishop to the King in chancery. The only passage, therefore, in this book which gives colour to the argument, is, the short paragraph stating, that, "if the matter concerns the King, the appeal must be to the higher house of convocation;" and which refers, as before mentioned, to the passage in the Fourth Institute.

Comyns's Digest (a) has also been cited. It is there said: "In causes ecclesiastical, if the King be concerned, there shall be an appeal to the upper house of convocation. "This passage also refers, as the authority, to 4 Inst. 339, 340, and to the title "*Prerogative*" *(D. [*153 15). Under this reference, appeals to the convocation are spoken of: and, under that letter, the 24 H. 8, c. 12, *alone* is referred to, and which correctly states, that, by that statute, in causes testamentary, or of marriage, divorce, tithes, &c., which may touch the King, the appeal shall be to the upper house of convocation. Neither of these passages, therefore, when accurately examined, are authorities for the position for which they were cited. Under the same head of "*Prerogative*," in Comyns,—"*Appeal*" (D. 13), the statute 24 H. 8, c. 12, is referred to; and, after speaking of the appeals given by that statute, it states, "if the King be concerned, the appeal shall be to the upper house of convocation," and refers again to 4 Inst. 339, 340. But the next paragraph is,—"*And by the statute of 25 H. 8, c. 19, appeals shall be made in the same manner in all causes, of what nature soever.*" This paragraph is by no means necessary to be associated with the paragraph immediately preceding it, but may be well satisfied by its being referred to the statute of the 24 H. 8, c. 12, so far as the manner of conducting appeals is regulated; especially as, under letter (D. 14), both statutes are referred

(a) Title Convocation (D.), "*The Jurisdiction.*"

to, and the 4th section of the 25 H. 8, c. 19, and the 6th section of that statute, are quoted, without any qualification or restriction whatever in regard to causes touching the King; but, on the contrary, immediately after the statement of those two sections, it is said—“*and therefore, in all ecclesiastical causes, an appeal lies to the delegates.*” Upon the whole, therefore, Lord Chief Baron COMYNS is by no means an authority that the appeal in the present case did not lie to the delegates,—rather the contrary.

Woodeson's Lectures (a) was also referred to. The author, in speaking of the 25 H. 8, c. 19, and of the *convocation, and the King's *154] right to prorogue and dissolve it, proceeds,—“By the same prerogative, the King is the ultimate judge in matters and causes ecclesiastical. If, indeed, the cause affect the King, an appeal may, by the statute of the 24 Hen. 8, c. 12, be brought to the upper house of convocation.” Thus speaking as if, by that statute, an appeal to the convocation was given *in all cases*; which, as before seen, was never the case. He proceeds:—“This provision does not seem abrogated by the subsequent statute of the 25 H. 8, c. 19, by which appeals are to be made from the archiepiscopal courts to the King in chancery:” and reference here also is made to the foundation of all these extracts—the Fourth Institute, p. 339, 340. The authority, therefore, of this passage, referring only to the 4 Inst., before observed upon, cannot be deemed entitled to any weight.

Burn's Ecclesiastical Law was likewise mentioned. In that book, under the title “*Appeal*,” (b) the 2d and 4th sections of the 24 H. 8, c. 12, are set out also with a reference to the Fourth Institute, 339. In p. 59, the 25 H. 8, c. 19, ss. 3 and 5, are set out: and in p. 61, the 4th section of 25 H. 8, c. 19, is set out, followed by remarks upon the subject of appeal, but which contain no suggestion of any limitation or restriction, in any case whatever, upon the appeal to the King in chancery. In p. 63, the 9th section of the 24 H. 8, c. 12, is set out, with a reference to 4 Inst., pp. 339, 340, but without comment. Immediately afterwards, the 6th section of 25 H. 8, c. 19, is set out as an universal proposition, with a reference to a note at the foot, stating—“*therefore, in all ecclesiastical causes, appeal lies to the delegates.* 4 Inst. 339.”

*155] These passages are all that are to be found in Burn *applicable to this subject; and the result seems to be, that it is an authority rather against the argument than in support of it.

Reference was also made to Blackstone. (c) That author, in relation to the statute of 25 H. 8, states that the statute was but declaratory of the ancient law of the realm; and refers to 4 Inst. 341, and then adds,—“*But, in case the King himself be party in any one of those suits, the appeal does not lie to him in chancery, which would be absurd; but,*

by the statute of 24 H. 8, c. 12, to all the bishops of the realm assembled in the upper house of convocation." This statement refers to the 24 H. 8, c. 12: and the statute of 25 H. 8, c. 19, is referred to in this and other passages of Blackstone generally. And in p. 65, in speaking of the court of peculiars, it states—"All ecclesiastical causes arising there, from which an appeal lay formerly to the Pope, now, by the statute of 25 H. 8, c. 19, is, to the King in chancery." And again, in speaking of the Prerogative court, it is said—"An appeal lies, by the statute of 25 H. 8, c. 19, to the King in chancery, instead of the Pope, as formerly. This passage is unaccompanied by any qualification; yet, in the passage in p. 67, when stating that the appeal is to the convocation, in any of those suits enumerated in the 24 H. 8, c. 12, reference is made only to appeals under the 24 H. 8, and nothing said respecting appeals arising under the 25 H. 8, c. 19, or of the effect of the 25 H. 8, c. 19, upon the appeals under the 24 H. 8, c. 12.

Blackstone, in thus referring to the statutes, gives no opinion whatever, except upon the effect of the 9th section of the 24 H. 8, c. 12, upon which, taken by itself, no doubt has ever been entertained. It is unnecessary, therefore, to consider what would have been *the weight of an opinion, if expressed, as compared with the practice [*156] which has prevailed.

In Serjt. Stephen's edition of Blackstone, (a) the passage before referred to is set out in the following manner:—"But, in case the King himself be party in any of these suits, the appeal did not then lie to himself in the delegates, which would have been absurd, but, by the statute of 24 H. 8, c. 12, is given"—then the following passage is in brackets—"[to all the bishops of the province, assembled in the upper house of convocation]." And the editor then proceeds to state—"By the 2 & 3 W. 4, c. 92, it is now provided, that every person who might formerly have appealed under 25 H. 8, c. 19, may now appeal to Her Majesty in council; and by 3 & 4 W. 4, c. 41, s. 3, and 6 & 7 Vict. c. 38, s. 11, that Her Majesty shall (may) by order in council direct that all appeals from ecclesiastical or other courts shall be referred to the judicial committee of the privy council." This passage cannot be referred to as authority, whatever respect is due to the very learned editor; but his opinion as to the effect of the recent statutes, is intimated with sufficient distinctness.

Ayliffe's Parergon was also cited: but the particular reference was not given: and the only passage that appears to have any application, is in pages 83, 84, where the statute of the 24 H. 8 only is mentioned. In p. 83 the statute is mentioned, and it is said, that, for avoiding delays in appeals in causes testamentary, matrimonial, tithes, &c., which concern the king, or any other person, the same shall be finally determined within the King's jurisdiction. And then, after the regulations

of the statute as to the order of appeals, and the time within which they are to be made, he proceeds :—" And *the cause or suit concerns the King, the *party grieved may, within fifteen days, appeal to the prelates assembled (by the King's writ) in convocation, then next in being or ensuing :*" and it is added—"see the act itself." Such is the only passage to be found: and it will be observed that the author has never at all referred to the statute upon which the question solely depends, viz., the 25 H. 8, c. 19. He mentions the 24 H. 8, c. 12, inaccurately, by stating that the appeal to the convocation must be made in fifteen days. But his remarks are confined to the appeal to the convocation in the causes mentioned in the statute of 24 H. 8, c. 12, of which causes this is not one. If all consideration of the 25 H. 8, c. 19, is excluded, of course no doubt exists in regard to the causes mentioned in the 24 H. 8, c. 12.

The principal authorities presented to the court upon the application for the rule, have now been referred to; and, upon a deliberate review of them, no one refers to, or is founded upon, any judicial decision or *dictum*; nor do they appear to be the result of an examination into the effect or construction of the two material statutes in connexion; but, as before stated, some of them merely give the sections of each of the statutes, and others state the effect of a provision in one of the statutes, as though it were the result of the provisions of both. They cannot, therefore, properly have any effect in controlling a construction which appears to us to be warranted by the language of the statute of the 25 H. 8, c. 19, and to be supported by and consonant with a course of construction and practice beginning in the reign of Queen Elizabeth, at a comparatively recent period after the acts of parliament in question came into operation, and continuing in 1812,—that practice having occurred before several judges of great eminence,—and unopposed by a single instance consistent with the opposite construction, or a single judicial *dictum*.

*158] *And it does not appear that any book of practice, or of forms, relating to appeals, contains any form or direction applicable to the prosecution of an appeal, under these statutes, to the convocation.

In determining upon the present application, we have attentively considered the circumstances under which it comes before us. The litigant parties have concurred in prosecuting the appeal to the judicial committee; and, after a decision has been come to, an objection is for the first time made, upon the ground of a want of jurisdiction in the tribunal.

The case was elaborately moved before the Court of Queen's Bench. That court has pronounced a deliberate judgment upon the construction of the statutes; and the applicant has since exercised his undoubted right of making a similar application to this court; and, when so doing, the learned counsel who made the motion, brought before us all the authorities that there is any reason to suppose have any bearing upon the subject. The Court of Queen's Bench having stated that there were several

instances of appeals to the delegates, founded upon the construction adopted by that court, nothing was presented to us during the argument in support of the application, tending to create any doubt of the accuracy of that statement,—although we cannot but suppose that due investigation was made as to the fact of such instances having occurred, and of their applicability to the case. And we have informed ourselves of the particulars of those cases, as before detailed: and, further, no appeal has been discovered to have been made to the convocation.

Under these circumstances, we have every reason to conclude that further discussion will not furnish additional information, or throw more light upon the subject; and, passing by any other question to which *the application might be subject,^(a) and founding our decision [*159 simply upon the construction of these particular ancient statutes, as supported by the usage in the only instances of appeals in matters touching the crown, known to have occurred since they passed,—we think that it would not be consistent with the due discharge of our duty, but would only tend to prolong a useless discussion, to grant any rule.

The late appeal in the case of *The Duchy of Lancaster*, has not been enumerated among the instances of appeals conformable to the construction of the statute adopted by the court, because it has occurred to us, that, as the question was, in which of two rights the crown was entitled to the subject-matter in contest, the litigation may not have been of that contentious character which would render the case an authority in support of the jurisdiction to which appeal was there made.

The judgment of the court is, that there be no rule in this case.

Rule refused.^(b)

(a) This Judgment, it will be observed, leaves untouched the question whether this was a case which touched the crown; nor does it notice the effect of the 3 & 4 W. 4, c. 41, s. 3, and 6 & 7 Vict. c. 38, s. 11.

(b) A similar application was afterwards made to the Court of Exchequer. That court granted a rule to show cause, which, after a very elaborate argument, and time taken for deliberation, was discharged, with costs. See 5 Exch. 630.†

See note D. at the end of this volume.

***HITCHINS v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY, In re EMERY. Nov. 21.** [*160

The proper course to obtain execution against a shareholder of a public company, under the 8 & 9 Vict. c. 16, s. 36, is, by motion for a *scire facias*, and not by a motion for a rule to show cause why execution should not issue against such shareholder.

A *scire facias* will not be granted upon an affidavit merely stating that judgment has been obtained against the company, and that two writs of *fi. fa.* issued against them, and had been returned *nulla bona*.

UNTHANK, on a former day in this term, obtained a rule calling upon George Emery, a shareholder in *The Kilkenny and Great Southern and*

Western Railway Company, to show cause why execution should not issue against him, under the 8 & 9 Vict. c. 16, s. 36. The motion was founded upon an affidavit by the clerk to the plaintiff's attorney, which stated that judgment had been recovered against the company and two writs of *fi. fa.* issued against them, one into Middlesex, and the other into Surrey, both of which had been returned *nulla bona*.

Slade now showed cause.—This motion is misconceived. The application should have been, for leave to issue a *scire facias*. The 36th section of the 8 & 9 Vict. c. 16, enacts, that, "if any execution, either at law or in equity, shall have issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up: provided always that no such execution shall issue against any shareholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made, upon motion in open court, after sufficient notice in writing to the person sought to be charged; *161] "and, upon such motion, such court may order execution to issue accordingly." Upon the banking act 7 G. 4, c. 46, s. 13,—the words of which are almost identical with those of the 8 & 9 Vict. c. 16, s. 36,(a)—it has repeatedly been held that the proper and only mode of proceeding, is, by *scire facias*, where, as here, it is sought to affect with the judgment against the company, persons who are not parties to the record: see *Bartlett v. Pentland*, 1 B. & Ad. 704 (E. C. L. R. vol. 20); *Bosanquet v. Ransford*, 11 Ad. & E. 520 (E. C. L. R. vol. 39), 3 P. & D. 298; *Cross v. Law*, 6 M. & W. 217;† *Whittenbury v. Law*, 6 N. C. 345, 8 Scott, 661. [WILLIAMS, J., referred to *Clowes v. Brettell*, 11 M. & W. 461,† upon the Patent Rolling and Compressing Iron Company's act, 4 & 5 Vict. c. lxxxiv. s. 12.] Although the statute says that execution may issue against the shareholder, still that does not *162] mean that the *ordinary machinery for bringing him before the court shall be dispensed with. Where that *was* intended, the legislature have used apt words to declare their intention; as in the 7

(a) The 13th section of the 7 G. 4, c. 46, is as follows:—"That execution upon any judgment in any action, obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that, in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained," &c.

& 8 Vict. c. 110, s. 68, which provides that "such execution may be issued, by leave of the court, or of a judge of the court, in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, *without any suggestion or scire facias in that behalf.*" (a) [MAULE, J.—Lord TENTERDEN, in *Bartlett v. Pentland*, lays down a broad and sound principle, which is perfectly intelligible; though the mode of carrying it out has been somewhat qualified by the later cases.] All the cases show that a *scire facias* is necessary. [JERVIS, C. J., (to *Unthank*), —How does this case differ from those which have been referred to?]

Unthank, in support of his rule.—The words of the 13th section of the 7 G. 4, c. 46, are not identical with those of the statute now under consideration. Besides, the restrictive words in that act have no application to the case of one situated like this party,—a present shareholder. There can be no injustice in saying,—as is suggested by PARKE, B., in *Thompson v. The Universal Salvage Company*, 3 Exch. 310,†—that, where a proper case is made out upon affidavit, the court may, under this statute, order execution to issue forthwith; and, if there be any doubt, may direct an issue or a *scire facias*. [WILLIAMS, J.—In *Wingfield v. Barton*, 2 Dowl. N. S. 355, which also arose upon the statute 4 & 5 *Vict. c. lxxxiv., s. 12, PATTESON, J., professes himself to be [*163 unable to discover any distinction between the words of that act and those of the 7 G. 4, c. 46, s. 13. MAULE, J.—To warrant an application to the court at all, it must be shown that execution has issued against the company, and that it has been fruitless.] Upon its appearing, to the satisfaction of the court, *upon affidavit*, that the execution against the company has been fruitless, the court may order execution to issue against the shareholder. [JERVIS, C. J.—According to the ordinary machinery of the law. The cases show clearly that you must proceed by *scire facias*.] The court may mould the rule, so as to give such measure of relief as the act of parliament warrants. [MAULE, J.—You are not provided with materials to enable you now to ask for a *scire facias*. You have no affidavit that the company has not sufficient property to satisfy the judgment.] This is a corporation which, by its very constitution, is incapable of holding land in England. The affidavit shows that two writs of execution have issued against the company, and that both have proved abortive. [JERVIS, C. J.—That is a mere statement of the attorney's clerk, not professing to be founded upon any accurate knowledge.]

Per Curiam.—A *scire facias* clearly is necessary in this case, before the plaintiff can be permitted to issue execution against a shareholder. The two statutes to which reference has been made, are not to be distinguished in this respect. Rule discharged, with costs.

(a) See *Corder v. The Universal Gas Light Company*, 6 Com. B. 190 (E. C. L. R. vol. 60) And see *Peart v. The Universal Salvage Company*, id. 478; *Thompson v. The Universal Salvage Company*, 3 Exch. 310.†

***164] *ACKROYD v. SAMUEL SMITH and THOMAS SMITH.**

It is not competent to a vendor to create rights unconnected with the use or enjoyment of the land, and to annex them to it: neither can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee.

In trespass *quare clausum fregit*, the defendants justified under a supposed right of way conveyed to them by A. The plea, after stating the conveyance to A. of "a certain close, and certain plots, pieces, or parcels of land, &c., together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing, for all purposes, in, over, along, and through a certain road, &c.," alleged an assignment by A. to the defendants of "the said lands, tenements, hereditaments, premises, and appurtenances," granted by the former deed; and then averred that the trespasses complained of were committed by the defendants, being owners of the said lands, &c., and in the possession and occupation thereof, in using the right of way for their own purposes. The plaintiffs, after setting out the deed upon which, demurred specially to the plea, on the grounds that the defendants claimed a more extensive right than that granted by the deed, and that, if the right as claimed was granted by the deed, it was not assignable:—

Held, that the grant to A. was not restricted to the use of the way for the purposes connected with the occupation of the land conveyed: but that the right in question was not one which inhered in the land, or which concerned the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by the assignment.

TRESPASS, for breaking and entering a close of the plaintiff, situate in the parish of Bradford, in the county of York, abutting on the west on a certain close of the defendants, on the east on a certain road running between the Bradford and Thornton turnpike-road and Legram's Lane, on the south on a certain other close of the plaintiffs called The Meadow, otherwise called Langsides, otherwise called Far Langsides, on the north partly on a certain close of the plaintiff used as a garden, and partly on certain other land of the plaintiff used as a yard or passage; and with feet in walking, treading down, &c., the grass, &c., and with the feet of divers horses, &c., and with the wheels of divers carts, wagons, and other carriages, crushing, &c., other the grass, &c., of the plaintiff, &c., &c.

*165] *Fifth plea,—that, long before and at the several times of committing the several trespasses in the declaration mentioned, and before and at the time of making the indenture of release and grant hereinafter next mentioned, there was, and from thenceforth hitherto hath always been, and still is, and at the several times of committing the several trespasses in the declaration mentioned, was, in and upon the said close in which, &c., a certain road running between a certain other road called the Bradford and Thornton turnpike-road and a certain lane called Legram's Lane: that, long before any of the said several times of committing any of the supposed trespasses in the declaration mentioned, and before and at the time of making the indenture of release and grant hereinafter next mentioned, to wit, on the 27th of September, 1837, one Ellis Cunliffe Lister was seised in his demesne as of fee, as well of and in the soil of the road in this plea first mentioned, as of and in the close in which, &c.: that, before any of the several times

of committing the trespasses in the declaration mentioned, to wit, on the 26th of September, 1837, the said Ellis Cunliffe Lister was also seised in his demesne as of fee of and in the lands, tenements, hereditaments, and premises in the hereinafter next mentioned indenture of release and grant mentioned, and therein and thereby released and conveyed to John Smith: that thereupon afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, he the said Ellis Cunliffe Lister, being so seised as aforesaid, to wit, on the day and year last aforesaid, by a certain indenture of bargain and sale then made between the plaintiff, one Richard Tolson, and the said Ellis Cunliffe Lister, of the one part, and the said John Smith of the other part, he the said Ellis Cunliffe Lister, for and in consideration of a certain sum of money, to wit, the *sum of 5s., then therefore paid by the said John Smith to the said Ellis Cunliffe Lister, did bargain and sell the last-mentioned lands, tenements, and premises, with the appurtenances, to the said John Smith; *habendum* to John Smith, his executors, administrators, and assigns, from the day next before the day of the date of the said indenture of bargain and sale, for the term of one whole year from thence next ensuing, fully to be complete and ended: that, by virtue of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession, the said John Smith became and was possessed of the last-mentioned lands, tenements, hereditaments, and premises, with the appurtenances, for the said term so to him thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said Ellis Cunliffe Lister, his heirs and assigns: that, the said John Smith being so interested as aforesaid, afterwards, and before any of the several times of committing the supposed trespasses in the declaration mentioned, to wit, on the 27th of September, 1837, by a certain indenture of release and grant then made between the plaintiff of the first part, the said Richard Tolson of the second part, the said Ellis Cunliffe Lister of the third part, the defendants of the fourth part, and the said John Smith of the fifth part,—profert,—for the consideration in the said indenture mentioned, he the said Ellis Cunliffe Lister did release unto the said John Smith and his heirs, a certain close and certain plots, pieces, or parcels of land or ground in the said indenture particularly mentioned and described, and which then were and are the lands, tenements, and premises in and by the said indenture of bargain and sale so bargained and sold as aforesaid; and also he the said Ellis Cunliffe Lister did in and by the indenture in this plea secondly mentioned, grant to the said John Smith, his heirs and *assigns, that he and they, respectively being owners and occupiers, for the time being of the said close, pieces, or parcels of land in, and by the said secondly mentioned indenture so released as aforesaid, or any of them, and all persons having occasion to resort thereto, should have the right and privilege of passing

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Held, that the grant to A. was not restricted to the use of the way for the purposes connected with the occupation of the land conveyed: but that the right in question was not one which inhered in the land, or which concerned the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by the assignment.

TRESPASS, for breaking and entering a close of the plaintiff, situate in the parish of Bradford, in the county of York, abutting on the west on a certain close of the defendants, on the east on a certain road running between the Bradford and Thornton turnpike-road and Legram's Lane, on the south on a certain other close of the plaintiffs called The Meadow, otherwise called Langsides, otherwise called Far Langsides, on the north partly on a certain close of the plaintiff used as a garden, and partly on certain other land of the plaintiff used as a yard or passage; and with feet in walking, treading down, &c., the grass, &c., and with the feet of divers horses, &c., and with the wheels of divers carts, wagons, and other carriages, crushing, &c., other the grass, &c., of the plaintiff, &c., &c.

*165] *Fifth plea,—that, long before and at the several times of committing the several trespasses in the declaration mentioned, and before and at the time of making the indenture of release and grant hereinafter next mentioned, there was, and from thenceforth hitherto hath always been, and still is, and at the several times of committing the several trespasses in the declaration mentioned, was, in and upon the said close in which, &c., a certain road running between a certain other road called the Bradford and Thornton turnpike-road and a certain lane called Legram's Lane: that, long before any of the said several times of committing any of the supposed trespasses in the declaration mentioned, and before and at the time of making the indenture of release and grant hereinafter next mentioned, to wit, on the 27th of September, 1837, one Ellis Cunliffe Lister was seised in his demesne as of fee, as well of and in the soil of the road in this plea first mentioned, as of and in the close in which, &c.: that, before any of the several times

of committing the trespasses in the declaration mentioned, to wit, on the 26th of September, 1837, the said Ellis Cunliffe Lister was also seised in his demesne as of fee of and in the lands, tenements, hereditaments, and premises in the hereinafter next mentioned indenture of release and grant mentioned, and therein and thereby released and conveyed to John Smith: that thereupon afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, he the said Ellis Cunliffe Lister, being so seised as aforesaid, to wit, on the day and year last aforesaid, by a certain indenture of bargain and sale then made between the plaintiff, one Richard Tolson, and the said Ellis Cunliffe Lister, of the one part, and the said John Smith of the other part, he the said Ellis Cunliffe Lister, for and in consideration of a certain sum of money, to wit, the *sum of 5s., then therefore paid [*166 by the said John Smith to the said Ellis Cunliffe Lister, did bargain and sell the last-mentioned lands, tenements, and premises, with the appurtenances, to the said John Smith; *habendum* to John Smith, his executors, administrators, and assigns, from the day next before the day of the date of the said indenture of bargain and sale, for the term of one whole year from thence next ensuing, fully to be complete and ended: that, by virtue of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession, the said John Smith became and was possessed of the last-mentioned lands, tenements, hereditaments, and premises, with the appurtenances, for the said term so to him thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said Ellis Cunliffe Lister, his heirs and assigns: that, the said John Smith being so interested as aforesaid, afterwards, and before any of the several times of committing the supposed trespasses in the declaration mentioned, to wit, on the 27th of September, 1837, by a certain indenture of release and grant then made between the plaintiff of the first part, the said Richard Tolson of the second part, the said Ellis Cunliffe Lister of the third part, the defendants of the fourth part, and the said John Smith of the fifth part,—profert,—for the consideration in the said indenture mentioned, he the said Ellis Cunliffe Lister did release unto the said John Smith and his heirs, a certain close and certain plots, pieces, or parcels of land or ground in the said indenture particularly mentioned and described, and which then were and are the lands, tenements, and premises in and by the said indenture of bargain and sale so bargained and sold as aforesaid; and also he the said Ellis Cunliffe Lister did in and by the indenture in this plea secondly mentioned, grant to the said John Smith, his heirs and *assigns, that he and they, respectively be- [*167 ing owners and occupiers, for the time being of the said close, pieces, or parcels of land in, and by the said secondly mentioned indenture so released as aforesaid, or any of them, and all persons having occasion to resort thereto, should have the right and privilege of passing

and repassing, with or without horses, cattle, carts and carriages, *for all purposes*, in, over, along, and through the said road in this plea first mentioned, or in, over, and through some other road in the same direction, to be formed by and at the expense of the plaintiff, his heirs or assigns, such other road, nevertheless, passing the south-east corner of a certain warehouse of the plaintiff, he the said John Smith, his heirs and assigns, paying to the plaintiff, his heirs and assigns, a proportionate part of the expense of repairing the said road, according to the use thereof by him or them, the said John Smith, his heirs and assigns, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns,—such proportionate expense to be determined as in the last-mentioned indenture mentioned; to hold the said lands, tenements, hereditaments, premises, and appurtenances, unto and to the use of the said John Smith, his heirs and assigns; by means and virtue whereof the said John Smith then became and was seised in his demesne as of fee, of and in the last-mentioned lands, tenements, hereditaments, and premises, with the appurtenances, and had then and thenceforward continually until and at the time of the making of the indenture of bargain and sale thereafter next mentioned, to himself, his heirs and assigns, respectively being owners and occupiers of the said close, pieces, or parcels of ground in and by the said secondly mentioned indenture so released as aforesaid, or any of them, the right and privilege so granted as aforesaid: that, *168] afterwards, and *long before any of the several times of the committing of any of the trespasses in the declaration mentioned, to wit, on the 9th of October, 1837, the said John Smith, being so seised, and so having such right and privileges as last aforesaid, by a certain indenture of bargain and sale then made between the said John Smith of the one part, and one William Kay of the other part,—he the said John Smith, for and in consideration of the sum of 5s. then therefore paid by the said William Kay to the said John Smith, did bargain and sell the last-mentioned lands, tenements, hereditaments, and premises, with the appurtenances, to the said William Kay; to have and to hold the same to the said William Kay, his executors, administrators, and assigns, from the day next before the date of the last-mentioned indenture, for the term of one whole year from thence next ensuing, and fully to be complete and ended: that, by virtue of the said last-mentioned indenture, and by force of the statute made for transferring uses into possession, the said William Kay then became and was possessed of the last-mentioned lands, tenements, hereditaments, and premises, with the appurtenances, for the said term so thereof to him granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said John Smith, his heirs and assigns: that, the said William Kay, being so interested as aforesaid, afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, to wit,

on the 10th of October, 1837, by a certain indenture of release then made between the said John Smith of the one part and the said William Kay of the other part,—profert,—for the consideration in the last-mentioned indenture mentioned, he the said John Smith did release unto the said William Kay, and to his heirs, the said several last-mentioned lands, tenements, hereditaments, premises, and appurtenances; to have and to hold the same to the only proper use of him the said William *Kay, his heirs and assigns for ever; by means and virtue whereof [*169 the said William Kay then became and was seised in his demesne as of fee of and in the last-mentioned lands, tenements, hereditaments, premises, and appurtenances: that afterwards, and after the 31st of December, 1837, and long before any of the several times of the committing of the several trespasses in the declaration mentioned, to wit, on the 16th of October, 1841, he, the said William Kay, being so seised as last aforesaid, duly made and published his last will and testament in writing, signed at the end thereof by the said William Kay, in the presence of two credible witnesses, present at the same time, which witnesses did then respectively attest and subscribe the said will in the presence of the said William Kay; and by the said will, he, the said William Kay, did give and devise the last-mentioned lands, tenements, hereditaments, premises, and appurtenances, unto and to the use of John Cunliffe Kay, Charles Whitaker, and Samuel Cunliffe Lister, their heirs and assigns: that, afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, to wit, on the 8th of February, 1842, the said William Kay died so seised of the last-mentioned lands, tenements, hereditaments, premises, and appurtenances, without having revoked or altered his said will; whereby and whereupon the said John Cunliffe Kay, Charles Whitaker, and Samuel Cunliffe Lister became and were seised in their demesne as of fee of and in the last-mentioned lands, tenements, hereditaments, premises, and appurtenances, and, they being so seised as last aforesaid, afterwards, and after the 15th of May, 1841, and long before any of the several times of the committing of any of the several trespasses in the declaration mentioned, to wit, on the 29th of December, 1845, by an indenture then made, and therein expressed *to be made, in [*170 pursuance and by virtue of an act of parliament made and passed in the session of parliament held in the fourth and fifth years of the reign of our lady the now Queen, for rendering a release as effectual for the conveyance of freehold estates, as a lease and release by the same parties, and which last-mentioned indenture was made between the said John Cunliffe Kay, Charles Whitaker, and Samuel Cunliffe Lister of the first part, one Joseph Smith, of the second part, the defendant Samuel Smith of the third part, the defendant Thomas Smith of the fourth part, and James Garnett of the fifth part,—which indenture, sealed with the seals of the said John Cunliffe Kay, Charles Whitaker, and Samuel Cun-

liffe Lister, the defendants brought into court, &c.,—they, the said John Cunliffe Kay, Charles Whitaker, and Samuel Cunliffe Lister, did, and each of them did, release unto the defendants, their heirs and assigns, all and singular the lands, tenements, hereditaments, premises, and appurtenances last mentioned; to have and to hold the same to the said defendants, their heirs and assigns for ever, to such uses, upon and for such trusts, intents, and purposes, and with and under and subject to such powers, provisoes, agreements, and declarations, as the defendants, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by them legally executed, should from time to time appoint, and, in default of and until such appointment, and so far as the same should not extend, then as to one undivided moiety or equal half part of and in the said hereditaments and premises, to such uses, upon and for such trusts and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as the defendant Samuel Smith, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new *171] appointment, or by his last will and testament in writing, or any writing in the nature of or purporting to be his last will and testament, to be by him legally executed and signed, should from time to time appoint; and, in default of and until such appointment, and so far as the same should not extend, to the use of the said defendant, Samuel Smith, and his assigns, during the term of his life, without impeachment of waste; and, after the determination of that estate, by any means, in his lifetime, to the use of the said James Garnett, his heirs and assigns, during the life of the said defendant Samuel Smith, in trust for the said defendant Samuel Smith and his assigns; and, after the decease of the said defendant Samuel Smith, to the use of the heirs and assigns of the said defendant Samuel Smith for ever; and, as to one other undivided moiety or equal half part of and in the said hereditaments and premises, to the use of the said defendant Thomas Smith, his heirs and assigns, for ever. Averment, that the defendants have not, nor has either of them, since the making of the last-mentioned indenture, legally executed any deed or deeds, instrument or instruments in writing, of or concerning the last-mentioned lands, tenements, hereditaments, premises, or appurtenances, or any part thereof: that, afterwards, and before any of the several times of the committing of the trespasses in the declaration mentioned, to wit, on the day and year last aforesaid, they the defendants entered into, and always thenceforth hitherto have had, and still have, possession and occupation of the said last-mentioned lands, tenements, hereditaments, and appurtenances, and became and were, and always thenceforth hitherto have been, and still are, respectively seised and owners thereof, according to the true intent and effect of the last-mentioned indenture, that is to say, the defendant Samuel Smith became and was, and always thenceforth hitherto hath been, and still is,

*seised for life of and in one undivided moiety thereof, the whole into two equal parts to be divided, and the defendant Thomas Smith became and was, and always thenceforth hitherto hath been, and still is, seised in his demesne as of fee of and in the other moiety thereof: and that the defendants, *being so seised and owners as aforesaid, and being in, and having, such possession and occupation as last aforesaid, and having occasion, for their own purposes, to use the right and privilege in that behalf granted and conveyed in and by the indenture of release and grant in this plea first mentioned, did, on foot and with their horses, &c., carts, wagons, and other carriages, at the said several times of committing the trespasses in the declaration mentioned, pass and repass for the purposes of them the defendants, in, over, along, and through the road in this plea first-mentioned, so being as aforesaid in and upon the close in which, &c., as they lawfully might for the cause aforesaid; and, in so doing, did unavoidably a little, with feet in walking, tread down, trample upon, consume, and spoil the grass and herbage growing and being in the close last-mentioned, and with the feet of the said horses, &c., and with the wheels of the said carts, &c., crush, damage, and spoil other the grass and herbage in the last-mentioned close also growing and being, and tear up, subvert, damage, and spoil the earth and soil of the last-mentioned close,—doing no unnecessary damage to the plaintiff on those occasions,—which were the same alleged trespasses in the declaration mentioned, and whereof the plaintiff had above complained against the defendant—verification.* [*172]

The plaintiff craved oyer of the indenture of release in the fifth plea firstly mentioned (which was accordingly set out), and then demurred specially to the plea, assigning for causes, amongst others, that it is not stated or shown in or by the said fifth plea, that the *defendants, in passing and repassing in, over, along, and through the road in that plea first mentioned, so being as aforesaid in and upon the close in which, &c., were passing or repassing to or from the said close, pieces, or parcels of land, in the said indenture of release in that plea first mentioned; and that it is not stated in or by the said fifth plea, that, in so passing or repassing for the purposes of them the defendants, as therein alleged, such purposes were the going to, or returning from, the said close, pieces, or parcels of land in the said first-mentioned indenture of release mentioned, or were for, or were connected with, or in any way related to, the use, occupation, enjoyment, or ownership of the said close, pieces, or parcels of land in the said first-mentioned indenture of release in that plea mentioned:—that the allegation in the said fifth plea, that the defendants did pass and repass for the purposes of them the defendants, in, over, along, and through the road in that plea first mentioned, so being as aforesaid in and upon the close in which, &c., was ambiguous and uncertain, and calculated to perplex the plaintiff in replying thereto or newly assigning trespasses thereon, and was [*173]

such that any new assignment thereon of trespasses by the defendants for other purposes than those in that plea mentioned, would be uncertain and ambiguous:—that it was not shown, nor did it appear, in or by the said fifth plea, that the purposes for which the defendants passed and repassed as in that plea mentioned, were purposes for which they were justified in passing and repassing, according to the right and privilege in that behalf granted and conveyed in and by the said indenture of release in that plea first mentioned:—that the plea did not specify the purposes for which the defendants so passed and repassed as aforesaid, so as to enable the court to judge whether such purposes were *174] according to the right and *privilege granted and conveyed in and by the said indenture of release in the said fifth plea first mentioned: and that the allegation in the fifth plea, that the defendants had occasion, *for their own purposes*, to use the right and privilege in that behalf granted and conveyed in and by the indenture of release in the said fifth plea mentioned, was ambiguous and uncertain, in not showing what purposes were within the right and privilege so granted and conveyed as aforesaid.

The deed as set out upon oyer was dated the 27th of September, 1837, and expressed to be made between Robert Stables Ackroyd (the plaintiff), of the first part, Richard Tolson, of the second part, Ellis Cunliffe Lister, of the third part, Samuel Smith, and Thomas Smith (the defendants), of the fourth part, and John Smith, of the fifth part. It recited, that, by indentures of release of the 1st and 2d of February, 1835,—the release made between Thomas Mason and Richard Thornton, therein described as devisees in trust and executors named in the will of Henry William Oates, of the first part, Margaret Oates, widow, of the second part, and the said Robert Stables Ackroyd, of the third part,—the close and pieces or parcels of land and hereditaments hereinafter described, and intended to be hereby granted and released, were, amongst other hereditaments, granted, limited, and assured to the use of the said Robert Stables Ackroyd and his heirs, for life, and, immediately after the determination of that estate by any means in his lifetime, to the use of the said Richard Tolson, his executors and administrators, during the life of the said Robert Stables Ackroyd, upon trust, nevertheless, for the only benefit of the said Robert Stables Ackroyd and his assigns, with remainder to the use of the said Robert Stables Ackroyd, his heirs and assigns for ever. It then recited indentures of lease and release, dated the 3d and 4th of February, 1833,—the release made *175] *between the said Robert Stables Ackroyd of the first part, Richard Tolson of the second part, and Thomas Mason and Richard Thornton of the third part,—whereby the premises mentioned in the last-mentioned deed were mortgaged to Mason and Thornton for 3000*l.*; and also indentures of lease and release of the 19th and 20th of August, 1834,—the release made between Robert Stables Ackroyd

of the first part, Richard Tolson of the second part, Thomas Mason and Richard Thornton of the third part, and Ellis Cunliffe Lister of the fourth part,—whereby, in consideration of 3000*l.* paid by Lister to Mason and Thornton, at the request and by the direction of Ackroyd, and also in consideration of 4000*l.* paid by Ellis to Ackroyd, the premises were conveyed to Lister, subject to a proviso for redemption on payment to Ackroyd, his executors, administrators, and assigns, of 7000*l.* and interest at 4½ per cent. on the 20th of February then next. It then recited a contract between Samuel Smith, John Smith, and Thomas Smith, and Robert Stables Ackroyd, for the sale to the former of “the said close and pieces or parcels of land and hereditaments hereinafter described,” for 2740*l.* 10*s.*, and that Samuel Smith and Thomas Smith had agreed to relinquish their interest in that contract to John Smith; and that Lister had consented and agreed to release and convey “the said close and pieces or parcels of land and hereditaments hereinafter described,” on the said sum of 2740*l.* 10*s.*, the purchase-money, being paid in equal moieties to him and to the said Robert Stables Ackroyd, he, Lister, being satisfied that the remaining part of the hereditaments and premises so in mortgage to him as aforesaid, was a sufficient security for the repayment of the remaining part of the said sum of 7000*l.* and interest. The indenture then witnessed, that, in pursuance of the said agreements, and in consideration of the sum of *1370*l.* 5*s.* paid to Lister, and the [*176 like sum to Ackroyd, and also in consideration of 10*s.* paid to Lister and Richard Tolson respectively, by John Smith, they, the said Ellis Cunliffe Lister and Richard Tolson, bargained, sold, and released, and the said Robert Stables Ackroyd, at the request and by the direction of Samuel Smith and Thomas Smith, granted, bargained, sold, aliened, released, ratified, and confirmed unto John Smith and his heirs, All that close, piece or parcel of land or ground called or commonly known by the name of the Mill field, situate in the township of Horton, in the parish of Bradford, in the county of York, bounded on or towards the north by the brook called Bradford Beck, and land the property of the devisees of the late J. H. Smyth, on or towards the south by the parcel of land next hereinafter particularly mentioned, on or towards the east in part by the said brook and in other part by the said last-mentioned parcel of land, and on or towards the west by land the property of John Bower, and containing, &c., and now in the possession or occupation of John Smith and of Joseph Smith and Thomas Smith; and also all that plot, piece or parcel of land or ground adjoining the said close of land on the south and east, and extending from the south side of the said close forty yards, and from the east side twenty yards, and containing, &c., which said plot, piece, or parcel of land was lately part of a close of land there, called or commonly known by the name of the cottage field, and is also in the possession or occupation of the said John Smith, Joseph Smith, and Thomas Smith; and also all that other piece

or parcel of land, comprising the soil and freehold of a certain road ten yards wide, and lately formed for the convenience of the said John Smith exclusively, and leading from and out of a certain other road thereafter mentioned to run between the Bradford and Thornton turnpike-road, and *177] Legram's *Lane, at the south-east of a certain warehouse lately erected by the said Robert Stables Ackroyd, to the said parcel of land lastly thereinbefore particularly mentioned, and containing, &c.,—all which said close and pieces or parcels of land or ground were lately part of several closes of land called Far Langsides, attached to an estate at or near a place called Legrams, in Horton aforesaid, and called The Field Head estate, and were described in a plan in the margin of the deed: Together with all ways, paths, passages (*particularly the right and privilege to and for the owners and occupiers, for the time being, of the said close, pieces, or parcels of land, or any of them, and all persons having occasion to resort thereto, of passing and re-passing, with or without horses, cattle, carts, and carriages, for all purposes, in, over, along, and through a certain road running between the Bradford and Thornton turnpike-road and Legram's Lane, or in, over, and through some other road in the same direction, to be formed by and at the expense of the said Robert Stables Ackroyd, his heirs or assigns,—such other road, nevertheless, passing the south-east corner of the said warehouse of the said Robert Stables Ackroyd; he the said John Smith, his heirs and assigns, paying to the said Robert Stables Ackroyd, his heirs and assigns, a proportionate part of the expense of repairing the said road, according to the use thereof by him or them, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns; and the said Robert Stables Ackroyd keeping the said road at all times in good and sufficient repair; such proportionate expense to be determined, in case of difference, by two persons, one to be chosen by each party, and, if they differ, by a third person or umpire, to be appointed by such two referees*), waters, water-*178] courses, springs of water (*particularly the *right, privilege, and enjoyment, for the purposes of the trade of a dyer, or otherwise, of all the water of the brook adjoining the said close, pieces, or parcels, thereby released, or intended so to be, or any of them, and of all springs or courses of water arising or being within the same premises; the said Robert Stables Ackroyd thereby granting and guaranteeing such rights to the said John Smith, his heirs and assigns, free from all interruption whatsoever by any person having a right to or in respect of such water respectively, except the owners of the land on the opposite side of the brook, in respect of their rights*), mines, minerals, quarries, and the ground and soil thereof, mounds, fences, hedges, ditches, rights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and *appurtenances*, to the said close, pieces or parcels of land or ground, and hereditaments, or any part thereof respectively,

belonging, or in anywise appertaining, or with the same or any of them, or any part thereof respectively, now, or at any time heretofore, held and occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof respectively, or appurtenant thereto: And the reversion, &c.; *Habendum*, to John Smith, his heirs and assigns, for ever. Then followed a covenant by Ackroyd, that Lister, Tolson, and Ackroyd, or some or one of them, were or was lawfully seised in fee, and had full power and authority to convey "the said close, and pieces or parcels of land, hereditaments, and premises mentioned to be thereby released, *with their appurtenances*, in manner aforesaid," and a covenant for quiet enjoyment, "without the interruption or denial of the said Robert Stables Ackroyd, his heirs or assigns, or of any other person or persons whomsoever."

The demurrer was argued in Easter term last.

**Tomlinson*, in support of the demurrer.(a)—The way in question is only granted for the use of the premises conveyed: and, [*179 if larger, it did not pass by the subsequent conveyances, as appurtenant; but the grant must be considered as a grant in gross. In *Cowling v. Higginson*, 4 M. & W. 245,† in trespass *quare clausum fregit*, the defendant pleaded, under the 2 & 3 W. 4, c. 71, a right of way for the occupiers of a close for twenty years, for horses, carts, wagons, and carriages, at their free will and pleasure: upon a replication traversing the right as pleaded,—it was held that the plaintiff might show that the defendant had a right of way for horses, carts, wagons, and carriages, *for certain purposes only*, and not for all, and was not compelled to new assign; and that he might show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which his right extended.(b) That case shows that the words here, "for all purposes," mean, for all purposes connected with the occupation of the land conveyed. The context—"and all persons having occasion to resort thereto"—shows that the grant ought to be construed in this limited sense. If the grant be as large as is contended for, then it does not pass to the assignee of the land. In *Staple v. Heydon*, 6 Mod. 3, Com. Dig. *Chimin* (D. 1), it was agreed by the court *—"that a man cannot claim a way over my ground from one part thereof to another; but, from one part of his own ground to [*180 another, he may claim a way over my ground." In pleading such a right, the *termini* must be stated with accuracy: Com. Dig. *Chimin* (D. 2);

(a) The point marked for argument on the part of the plaintiff, was as follows:—"That the right of way granted by the first indenture of release in the fifth plea first mentioned, was a right of way only to and from the land and hereditaments thereby conveyed, and that the defendants, in justifying the alleged trespasses, have not alleged that the same were committed in passing and re-passing to and from the land and hereditaments conveyed by that deed, but have alleged that the same were committed in passing and re-passing *for the purposes of them the defendants, without any limitation of such purposes*,—thereby claiming a more extensive right than was so granted by the said indenture."

(b) *Quere*, the materiality or relevancy of this fact.

Rouse v. Bardin, 1 H. Blac. 352, *Simpson v. Lewthwaite*, 3 B. & Ad. 226 (E. C. L. R. vol. 23). [MAULE, J.—The *termini* are stated at the beginning of the plea.] Not so; for, one *terminus* must be in the party's own land. The right cannot be enlarged by the act of the grantee: Com. Dig. *Chimin* (D. 5); *Lawton v. Ward*, 1 Lord Raym. 75, 1 Lutw. 111, *Howell v. King*, 1 Mod. 190, *Senhouse v. Christian*, 1 T. R. 560, *Dand v. Kingscote*, 6 M. & W. 174,† *Allan v. Gomme*, 11 Ad. & E. 759 (E. C. L. R. vol. 39), 3 P. & D. 581.

2. A right of way, such as that granted by this deed, is not assignable. In Sheppard's Touchstone, p. 239, it is said—"Licenses and authorities are grantable at first for the lives of the parties, or for years. But the grantees of them cannot assign them over. And, therefore, if power be given to me to make an award or livery of seisin, I may not grant over this power to another. And, if license be granted me to walk in another man's garden, or to go through another man's ground, I may not give or grant this to another." So, Blackstone, speaking of the right of going over another man's ground, says: (a) "This may be grounded on a special permission; as, when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company." This is analogous to common *181] *Weekly v. Wildman*, 1 Lord Raym. 407. But, if it were assignable, the deed here does not assign it: it only conveys the premises, *with the appurtenances*. Formerly, a way could not be claimed as appurtenant to a messuage, *Godley v. Frith*, Yelv. 159; (b) as common of turbary might—*Solme v. Bullock*, 3 Lev. 165. Appurtenant may mean "appertaining and belonging," that is, essential to the use or enjoyment of the land or house conveyed. If the way be *incident* to the house, it will pass without the word "appurtenances;" but, if it be not, the addition of that word will not help. In *Barlow v. Rhodes*, 1 C. & M. 439,† it was held that the words "with all ways thereto belonging, or in any wise appertaining," in a conveyance, will not pass a way not strictly appurtenant, unless the parties appear to have intended to use those words in a sense larger than their ordinary legal sense. So, in *Plant v. James*, 5 B. & Ad. 791, where two co-heiresses, being seised each of an undivided moiety of two estates, conveyed to H., in fee, for the purpose of making partition, one of the estates, called Parkhall, to which they were entitled by descent as co-parceners in fee, and another, called Woodseaves, of which they were tenants in tail, together with all houses, outhouses, edifices, orchards, ways, paths, passages, rights, members, and *appurtenances* whatsoever to the said several messuages, tenements, lands, and hereditaments belong-

(a) 2 Bl. Comm. 35.

(a) And see 3 Salk. 40.

ing, or therewith usually held or occupied; to hold Parkhall to H., in fee to certain uses, and Woodseaves to H., in fee, to the use of H. and his heirs, to make him tenant to the *præcipe*, in order to suffer a common recovery. The deed contained a covenant to levy a fine of the moiety of one of the co-heiresses in Parkhall, *and a declaration that a recovery should be suffered of Woodseaves, and then declared the [*182 uses of the fine, recovery, and conveyance, as to Parkhall, with the buildings, lands, hereditaments, and appurtenances thereto respectively belonging, to be, to such uses as the husband of that co-heiress should appoint, and, as to Woodseaves, with the buildings, lands, hereditaments, and appurtenances thereunto belonging, to the use of the other co-heiress, in fee. The fine was levied, and the recovery suffered. And it was held, that a way from the King's highway over the Woodseaves estate to the Parkhall estate, which, before the conveyance, fine, and recovery, had always been used by the occupiers of Parkhall, did not pass by the deed of partition, fine, and recovery, to the owner of Parkhall.

Then, the plea is ambiguous as to the nature of the way claimed; and although it follows the *words* of the grant, it does not give their legal effect. It is so vague and uncertain that the plaintiff cannot new assign. "If the meaning of words used in pleading be equivocal, they shall be taken most strongly against the party pleading them:" per BULLER, J., in *Dovaston v. Payne*, 2 H. Blac. 531.(a)

T. F. Ellis, contra.—The questions for the decision of the court in this case are, in effect, two,—first, what was the precise nature of the right which the grantee took under the deed of the 27th of September, 1837;—secondly, whether, supposing that the right which the parties took was a right to use the way *for all purposes*, and not merely a right to use it for the purpose of passing to and from the land conveyed, he could assign that right as annexed to the occupation of the land.

*1. There is no rule of law which prevents a party from giving the more extended right here claimed. It is assumed, in *Wood v. Leadbitter*, 13 M. & W. 838,†(b) that such a right may be conferred by deed, though not by *parol*. This is not claimed in the ordinary sense of a way, but as a right of passage not confined between *termini*. The words are general; the right is granted *for all purposes*; and these words are not to be limited by the other words used in the deed, which, according to the well-known rule, is to be construed most strongly against the grantor. The circumstance of the grantee's covenanting to contribute towards the expense of repairing the road, in proportion to the extent of his user of it, affords a strong argument in favour of the validity of the grant. No doubt, where the grant is of a way from A.

(a) But, where, instead of demurring, the opposite party has pleaded over, an equivocal expression is to be taken in that sense which will support the ambiguous pleading: 6 Com. B. 749 (*E. C. L. R.* vol. 60), n.; 7 Com. B. 329 (*E. C. L. R.* vol. 62).

(b) And see *Coble v. Allen, Hutton*, 10.

to B., it should be so described: but that is not the true nature of this claim.

2. Assuming this to be a grant of an unrestricted right of way, can it be assigned so as to pass with the land? This is not like the case of a mere license, which, whether by deed or by parol, is revocable: but is a grant of an easement essential to the full enjoyment of the land conveyed. The principle relied on by the other side, that land cannot be appurtenant to land, has no application here.

3. There is no ambiguity in the plea. It is impossible to conceive any purpose for which the grantee or his assigns would not have the right of passing and repassing over and along the road in question: the case, therefore, is wholly unaffected by the doctrine laid down in *Dovaston v. Payne*.

Tomlinson, in reply.—Both the deed and the plea show that this is claimed as a *way*, in the ordinary *sense: it is found amongst the *184] general enumeration of “all ways, paths, passages,” &c.: the rule, *noscitur à sociis*, therefore, applies. There is nothing to show that this is a right annexed to land, or one which would pass by assignment as appurtenant to land.

Cur. adv. vult.

CRESWELL, J., now delivered the judgment of the court:—(b)

This was an action of trespass, for breaking and entering a close of the plaintiff, in the parish of Bradford, in the county of York, describing it by abutments, and with feet in walking, and with horses, carts, and carriages, damaging and spoiling the grass, &c.

The defendant pleaded,—amongst other pleas,—that, long before and at the time of committing the alleged trespasses in the declaration mentioned, and at the time of making the release and grant thereinafter mentioned, there was, and thenceforth continually had been, and still was, and at the several times, &c., was, in and upon the said close in which, &c., a certain road, running between a certain other road called “The Bradford and Thornton turnpike-road,” and a certain lane called “Legram’s Lane;” that, long before and at the time of making the indenture of release and grant thereinafter mentioned, to wit, on, &c., one Ellis Cunliffe Lister was seised in his demesne as of fee, as well of the soil of the road in that plea first mentioned, as of and in the close in which, &c.; that, before the time of committing the trespasses, the said Ellis Cunliffe Lister was also seised in his demesne as of fee of and in the lands, tenements, hereditaments, and premises in the thereinafter next mentioned indenture of release *185] *and grant mentioned, and therein and thereby released and conveyed to John Smith; that, afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, he, the said Ellis Cunliffe Lister, being so seised, on, &c., by

(a) The argument took place on the 1st of June last, before MAULE, J., CRESWELL, J., and TALFOURD, J.

lease and release conveyed to John Smith and his heirs, to the use of him, his heirs and assigns for ever, a certain close and plots or parcels of land; that the said Ellis Cunliffe Lister did, in and by the said last-mentioned indenture, grant to the said John Smith and his heirs and assigns, that he and they respectively, being owners and occupiers for the time being of the said close, &c., so released as aforesaid, and all other persons having occasion to resort thereto, should have the right and privilege of passing and repassing, with or without horses, cattle, carts, and carriages, *for all purposes*, in, over, along, and through a certain road running between the Bradford and Thornton turnpike-road and Legram's Lane, or in, over, and through some other road in the same direction, to be formed by, and at the expense of, the plaintiff, his heirs or assigns, such other road nevertheless passing the south-east corner of the warehouse of the plaintiff,—he, the said John Smith, his heirs and assigns, paying to the plaintiff, his heirs and assigns, a proportionate part of the expense of repairing the said road, according to the use thereof by him or them, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns. The plea then deduced a title in Samuel Smith to a life-estate in one moiety of the said lands, tenements, hereditaments, *and appurtenances*, and in Thomas Smith to an estate in fee in the other moiety thereof, and alleged possession before and at the times when, &c., and proceeded,—“and the defendants, being so seised and owners as aforesaid, and being in and having such possession and occupation as aforesaid, and *having occasion, for their own purposes, to use [*186 the right and privilege in that behalf granted and conveyed in and by the indenture of release and grant in this plea first mentioned did, on foot, and with their horses, &c., at the said several times, &c., pass and repass, for the purposes of them, the defendants, in, over, and along, and through the road in that plea first mentioned, so being as aforesaid in and upon the said close in which, &c., as they lawfully might.”

The plaintiff cravedoyer of the deed,—which was between the plaintiff of the first part, Richard Tolson of the second part, Ellis Cunliffe Lister (to whom the plaintiff had mortgaged the premises) of the third part, Samuel Smith and Thomas Smith of the fourth part, and John Smith of the fifth part,—the plaintiff, as well as Lister, being made a conveying and granting party. [His Lordship read the material parts of the deed.] The plaintiff then demurred, assigning for causes, amongst others, that the plea did not show that the trespasses justified were committed in going to or from the premises conveyed, or that they were in any way connected with the enjoyment of those premises.

In support of the demurrer, it was contended,—first, that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification

pleaded,—and, secondly, that, if the grant was more ample, and gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land, and therefore the defendants could not claim it under a conveyance of the land, *with the appurtenances*. On the other hand, it was contended that the right created by *187] deed might be assigned *by deed*, together with the land, *and was large enough to maintain the justification pleaded.

Upon consideration, we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer.

If the right conferred by the deed set out, was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But, if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land,—and, this, we think, is the true construction of it,—it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it. In the case of *Keppell v. Bailey*, 2 Mylne & K. 517, the subject of covenants running with the land, was fully considered by Lord Chancellor BROUGHAM; and the leading cases on it are collected in his judgment. He there says: (a) “The covenant (that is, such as will run with the land) must be of such a nature as ‘to inhere in the land,’ to use the language of some cases; or, ‘it must concern the demised premises, and the mode of occupying them,’ as it is laid down in others: ‘it must be *quod-ammodo* annexed and appurtenant to them,’ as one authority has it; or, as another says, ‘it must both concern the thing demised, and tend to support it, and support the reversioner’s estate.’” Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them; it is not appurtenant to them. A covenant, therefore, that such a right should be enjoyed, would not run with the land. Upon the same principle, it appears to us *188] that such a right, unconnected with the *enjoyment or occupation of the land, cannot be annexed as an incident to it: nor can a way appendant to a house or land be granted away, or made in gross; for, no one can have such a way but he who has the land to which it is appendant: Bro. Abr. *Graunt*, pl. 130.(b) If a way be granted in gross, it is personal only, and cannot be assigned. So, common in gross *sans nombre* may be granted, but cannot be granted over—per TREBY, C. J., in *Weekly v. Wildman*, 1 Ld. Raym. 407. It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it: nor can the owner of land render it

(a) 2 Mylne & K. 537.

(b) Citing 5 H. 7, 7 (M. 5 H. 7, fo. 7, pl. 15): “Note, that it was said by FAIRFAX (Justice of C. P.) for law, that, if one has a way appendant to his manor, or to his house, by prescription, that way cannot be made in gross; because no man can take profit of that way, except he have the manor or the house to which the way is appendant.”

subject to a new species of burthen, so as to bind it in the hands of an assignee. "Incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner:" per Lord BROUGHAM, C., in *Keppel v. Bailey*.

This principle is sufficient to dispose of the present case. It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land. And it seems to us that a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter.

The defendants cannot, therefore, as assigns, avail themselves of the grant to John Smith; and our judgment must be for the plaintiff.

Judgment for the plaintiff.

A covenant to run with the land and bind the assignee, must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the lands or estate conveyed. *Nesbit v. Nesbit, Cameron & Norwood, 324*. Where the several owners of mills, drawing water by the same dam, covenanted with each other for themselves, their heirs and assigns, respecting the use of said water, it was held, that there was no privity of estate between the parties, and that the covenant did not run with the land so as to bind a grantee of one of said owners. *Hurd v. Curtis, 19 Pick. 459*.

But it is not necessary that the act in respect to which the covenant is made should be done on the premises demised; it must, however, be touching or concerning the thing demised as affecting the value of the reversion or the term, or influencing the rent. *Norman v. Wells, 17*

Wendell, 136. Therefore a covenant in a lease of a mill site on a certain stream for a term of years, that the lessor would not let or establish any other place or site on the same stream to be used for sawing mahogany, was held to be a covenant running with the land. *Ibid*. So a covenant not to erect a building in a common or public square, owned by the grantor in front of the premises conveyed, runs with the land. *Watertown v. Cowen, 4 Paige, 510*. A conveyed to B.'s grantor part of his mill-pond and a parcel of land, and after the same had been conveyed to B., covenanted with B. to draw off said pond, upon request, six days in the year. In an action by B. against the heirs of A. for a breach of said covenant, it was held that there was a privity between the parties, and that the covenant ran with the land. *Morse v. Aldrick, 19 Pick. 449*.

*LEVY v. MOYLAN, SMEDLEY, FLACK, and TRACY. [*189

A warrant of commitment under the 9 & 10 Vict. c. 95, s. 113, recited that A. "did wilfully insult the judge of the county court, during his sitting, and therefore the said judge did order that A. should be taken into custody, and detained until the rising of the court:" it then proceeded,—“these are, therefore, to require you, the high-bailiff, &c., to take the said A., and to deliver him to the governor of the house of correction,” &c., to be there detained for seven days, &c.:—Held, that the warrant was good upon the face of it, and justified the officer and the gaoler in taking and detaining A.

Smile, that the courts created under the above statute, though courts of record, are not superior courts.

TRESPASS. The declaration stated that the defendants, on the 20th of February, 1849, with force and arms, &c., made an assault upon the plaintiff, and there seized and laid hold of him, and with great force and violence pulled and dragged him about, and also then forcibly and

violently pulled and dragged him the plaintiff from and out of a certain building into the public street, and then forced and obliged him to go in and along divers public streets to a certain public gaol and house of correction, and then imprisoned him the plaintiff, and kept and detained him in prison, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of two days and two nights then next following, contrary to the laws and customs of this realm, and against the will of the plaintiff; whereby the plaintiff was greatly hurt, injured, &c.

The defendants severed in pleading. The defendant Moylan by his third plea justified, as judge of the Westminster County-Court of Middlesex, the committal of the plaintiff, for an insult offered to him as such judge.

Smedley and Flack,—as to the making an assault on the plaintiff, and as to seizing and laying hold of the plaintiff, and as to pulling and dragging the plaintiff about, and pulling and dragging the plaintiff from *190] and out of a certain building into the public street, and *forcing and obliging him to go in and along divers public streets, to a certain public gaol and house of correction, as in the declaration mentioned,—pleaded, thirdly, that, after the making and passing of the statute 9 & 10 Vict. c. 95, to wit, on the 6th of February, 1847, notice of the intention of Her Majesty to take into consideration the propriety of making the order in council thereafter mentioned, was, according to the form of the said statute, published in the London Gazette: That, after the expiration of one calendar month from the time when the said notice was so published as aforesaid, to wit, on the 9th of March, 1847, by an order of Her said Majesty in council, then in that behalf made, Her said Majesty, with the advice of Her then privy council, did, in pursuance of the provisions of the said act, and according to the form thereof, order that the said act of parliament should be put in force in the county of Middlesex on the 15th of March, 1847; and by the same order in council did, with the advice of Her said then privy council, according to the form of the said act, then divide the whole of the said county of Middlesex, including all counties of cities and counties of towns, cities, boroughs, towns, ports, and places, liberties, and franchises in the said county of Middlesex contained, or to the same county belonging, into divers, to wit, eleven different districts,—the respective limits and contents of which several districts were then, in and by the said order, by Her said Majesty, with the advice aforesaid, specified, distinguished, and described; and in and by the same order, Her said Majesty did, with the advice aforesaid, order that one of the said districts should include all within a line drawn from the point where the cities of London and Westminster meet on the river Thames, along the boundary of the city of London, to Holborn Bars, thence along the middle of

*Holborn, Oxford Street, and the Uxbridge Road, until the Uxbridge Road crosses the Serpentine River, thence along the Serpentine River to Rotten Row, thence along the middle of the road through Albert Gate to the Knightsbridge Road, thence along the middle of the Knightsbridge Road to Sloane Street, thence along the middle of Sloane Street, across Sloane Square, along the middle of Lower Sloane Street, Turk's Row, and Franklin's Row, to the gate leading into the road which divides the kitchen garden of Chelsea Hospital from the governor's garden and Garden Meadow, thence along the said road and the boundary of the said Hospital kitchen garden to the river Thames, thence along the Thames to the point first described: That Her said Majesty did, by the said order, with the advice aforesaid, order that a county-court, to be holden under the said act, should be held in and for the said last-mentioned district, in some convenient place in the same district, and that such court should be called "The Westminster County-Court of Middlesex," and should be the district of the same court under the said act: That, afterwards, and after the 15th of March, 1847, to wit, on the said 9th day of March, in the last-mentioned year, the said order in council was published in the London Gazette, according to the form of the said act: That the said order in council remained in full force, and not in any way altered, superseded, revoked, or countermanded, from the time of the making thereof as aforesaid, until and at and during all the several times thereafter mentioned, respectively: That, after the said 15th of March, 1847, and before the said time when, &c., in the declaration mentioned, and whilst the said order of our said lady the Queen was in full force, and not in any way altered, to wit, on the day and year in the declaration mentioned, at and in the said Westminster *county-court of Middlesex, then holden in the said building in the declaration first mentioned, in and for the said district at Westminster, in the county of Middlesex, according to the form of the said act,—the said building then being a convenient place for the holding of the said court, and the said court then being a court holden under the said act,—the defendant Dennis Creagh Moylan, then being the judge of the same court, did, according to the form of the said act of parliament, by a warrant under his, the judge's, hand, and sealed with the seal of the said court, and directed to the defendant Francis Smedley, Esq., in the said direction named and described as the high-bailiff of the said court, and to the other bailiffs of the said court, and to all constables and peace officers within the jurisdiction of the said court, and to the governor of the house of correction for Middlesex, at Tothill Fields, Westminster,—after reciting, that, at the said court so holden as last aforesaid, the plaintiff did wilfully insult him, the said Dennis Creagh Moylan, Esq., the judge of the said court, during his sitting in the said court, so holden as last aforesaid, and that thereupon the said judge did order that the plaintiff should be taken into

oustody, and detained until the rising of the said court,—therefore require the said high-bailiff, bailiffs, and others in the said direction of the said warrant mentioned, to take the plaintiff, and to deliver him to the said governor of the said house of correction; and by the said warrant the said judge did require the said governor of the said house of correction to receive the plaintiff, and him safely to keep in the said house of correction, for the term of seven days from the date of the said warrant, or until he should be sooner discharged by due course of law: That the said district of the said court included part of the city and liberty of Westminster *193] in the said *act mentioned: That, before and at the time of the making of the said warrant, and from thenceforth at and during the said time when, &c., in the declaration mentioned, the said Francis Smedley was the high-bailiff of Westminster, mentioned in the said act, and, as such, the high-bailiff of the said court: That, after the said 15th of March, 1847, and before the said warrant was so made as aforesaid, to wit, on the 16th of March, in the year last aforesaid, the said Francis Smedley, then being such high-bailiff of Westminster, and high-bailiff of the said court as aforesaid,—and who, from thence until and at the time of the making of the said warrant, continued to be such high-bailiff of the said court,—by a writing under his the said high-bailiff's hand, with the assent of the said William Flack, appointed the defendant William Flack, then being an able and fit person in that behalf, to be a bailiff to assist him the said high-bailiff, according to the form of the said act: That, at the time when the said William Flack was so appointed as aforesaid, the number of bailiffs appointed by the high-bailiff of the said court to assist the high-bailiff of the said court, inclusive of the said William Flack, did not exceed the number of such assistant bailiffs then allowed by the judge of the said court: That the said William Flack, from the time when he was so appointed as aforesaid, until and at the time of the making of the said warrant as aforesaid, and from thence at and during the said time when, &c., in the declaration mentioned, continued to be, and was, such assistant bailiff as aforesaid: That, after the making of the said warrant, and before the said time when, &c., in the declaration mentioned, and at and in the said court so holden in the said building as aforesaid, to wit, on the day and year in the declaration *194] mentioned, the said warrant was delivered to the now pleading *defendants, then being such high-bailiff and assistant bailiff respectively as aforesaid, to be executed in due form of law: And that, by virtue of the said warrant, the now pleading defendants, while the said warrant was in force, and before the expiration of the said seven days from the date thereof, to wit, at the said time when, &c., in the declaration mentioned, in the said building in which the said court was so holden as aforesaid, took the plaintiff by his body, within the said district of the said Westminster county-court of Middlesex, and compelled him to go, by a reasonable and public way in that behalf, to the

said house of correction in the said direction of the said warrant mentioned as aforesaid, and at the said house of correction delivered the plaintiff and the said warrant to the said governor of the said house of correction in the direction of the said warrant mentioned, being the prison to which the said judge had power to commit offenders under the said act, and also being the gaol and house of correction in the declaration mentioned, and, in so doing, did, at the said time when, &c., in the declaration mentioned, necessarily a little assault the plaintiff, and seize and lay hold of the plaintiff, and pull and drag the plaintiff about, and pull and drag the plaintiff from and out of the said building in the declaration mentioned, in which the said court was so holden, into the said public street, and force and oblige the plaintiff to go in and along the said public street in the declaration mentioned, to the said house of correction in the declaration mentioned, being the public gaol and house of correction in the declaration mentioned, as they lawfully might for the cause aforesaid, using no unnecessary violence, and doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the said supposed trespasses to which that plea was pleaded, *and whereof the plaintiff had in the declaration above com- [*195 plained,—verification.

The defendant Tracy, as governor of the house of correction, in a similar manner justified the reception and detention of the plaintiff under the warrant.(a)

To each of these pleas the plaintiff demurred specially, assigning for causes,—that the plea was uncertain and bad, in this, that the warrant therein mentioned, as therein set out, was void and altogether bad on the face thereof;—that the warrant, as set out in the said plea, appeared to be bad, in this, that it did not show in what manner the plaintiff insulted the said D. C. Moylan, whether by words, or gestures, or acts, or in what other manner;—that the warrant, as set out in the plea, contained no commitment of the plaintiff to any such prison as in the plea is mentioned;—that the waraant, as set out in the plea, was void and bad, in this, that it did not appear therefrom that there was any adjudication or order of the court in the said warrant and in the plea mentioned, for the commitment or imprisonment of the plaintiff for the time in the said warrant mentioned, the order in the said warrant mentioned being merely for an imprisonment until the rising of the court; whereas, the warrant required that the plaintiff should be imprisoned for seven days, &c.

To the third plea of the defendant Moylan, the plaintiff new assigned, that he commenced the said action against the defendant, not only for the several trespasses in his said third plea mentioned, and therein attempted to be justified, but also for that the defendant D. C. Moylan, at the time in the said declaration mentioned, by a certain warrant in writing by him the said D. C. Moylan signed, did cause, procure, and order the

(a) See *Hayes v. Keene*, post, B. T. 1862.

other defendants Smedley, Flack, and Tracy, to assault and imprison the plaintiff, in manner as in the *declaration, and which warrant or *196] writing is as follows, that is to say, "In the Westminster county-court of Middlesex. To Francis Smedley, Esq., the high-bailiff, and the other bailiffs of the court, and to all constables and peace officers within the jurisdiction of the said court, and to the governor of the house of correction for Middlesex, at Tothill Fields, Westminster: Whereas, at a court holden at St. Martin's Lane, Westminster, on the 21st day of February, 1849, Lawrence Levy did wilfully insult Dennis Creagh Moylan, Esq., the judge of the said court, during his sitting in the said court; and thereupon the said judge of the said court, did order that the said Lawrence Levy should be taken into custody, and detained until the rising of the court: These are, therefore, to require you, the said high bailiffs and others, to take the said Lawrence Levy, and to deliver him to the governor of the house of correction for Middlesex, at Tothill Fields, Westminster; and you, the said governor, are hereby required to receive the said Lawrence Levy, and him safely to keep in the said house of correction for the term of seven days, from the date hereof, or until he shall be sooner discharged by due course of law. Given under the hand of the said judge, and seal of the said court, this 21st day of February, 1849. DENNIS CREAGH MOYLAN, Judge of the said court. By the court, CHRISTOPHER CUFF, clerk,"—by reason of which said warrant or writing, the plaintiff was, on the day mentioned in the said declaration, assaulted, seized, and laid hold of by the defendants, and by them imprisoned, and kept and detained in prison, for the time and in the manner in the declaration mentioned, without any reasonable or probable cause whatsoever, and against the will of the plaintiff; which said assault and imprisonment above newly assigned, was another and different assault and imprisonment than the said assault and imprisonment in the last plea *197] mentioned, and thereby attempted to *be justified: and this the plaintiff was ready to verify, wherefore, inasmuch as the defendant Dennis Creagh Moylan had not answered the said trespasses above newly assigned, he the plaintiff prayed judgment and his damages by him sustained on occasion of the committing thereof to be adjudged to him, &c.

The defendant Moylan pleaded to the new assignment,—thirdly, that the said trespasses above newly assigned were, and each of them was, committed after the passing and coming into force of the act of parliament in the second plea of the defendant Moylan to the declaration mentioned; that, before and at the said times when the alleged trespasses, and every of them, were committed, he, Moylan, was the judge of the county court in the said second plea also mentioned, being a court theretofore, and then, and thence continually, duly constituted, appointed, and holden according to the said statute, and which then and still was the court in the warrant in the new assignment of the plaintiff

mentioned; that, just before the committing of the said newly assigned trespasses, to wit, on the day and year in the declaration first mentioned, the said county-court was holden, and a sitting thereof took place, to wit, at a certain building appointed in that behalf within the jurisdiction of the said court, according to the form of the said statute, to wit, at the building in the declaration mentioned, and the defendant Moylan was then and there sitting in the said court as the judge thereof; that the plaintiff then, and before the committing of the said trespasses, or any of them, and within the said jurisdiction, and at and in the said court, wilfully insulted the defendant Moylan during his said sitting in the said court as such judge as aforesaid, and whilst he was so sitting as such judge thereof as aforesaid; whereupon the defendant Moylan then and there, during the said sitting, and before the rising of the [*198 *said court, and at and in the said court, and within the jurisdiction thereof, did, according to the form of the said statute, order that the plaintiff should, for his said offence, be taken into custody and detained until the rising of the said court, and that he should be committed for seven days then next to the house of correction in the declaration and new assignment mentioned,—which then and always was a prison within the jurisdiction of the said county-court, to which the defendant Moylan, as such judge as aforesaid, then and always had power to commit offenders under the said act of parliament: that the plaintiff was then and there, and at and in the said court, and within the jurisdiction, and during the said sitting thereof, accordingly taken into custody and detained until the defendant Moylan afterwards, on the same day, and within and at a reasonable time in that behalf, and during the said sitting of the said court, and before the rising thereof, and at and in the said court, and within the jurisdiction thereof, did, according to the said statute, in order to commit the plaintiff for seven days to the said house of correction in the declaration and in the new assignment mentioned, according to law, make his warrant in the new assignment mentioned, signed by him the defendant Moylan, and sealed with the seal of the said county-court, and did thereby then command as therein is commanded,—which said warrant was then and there, and at and in the said court, and during the said sitting, and before the rising thereof, delivered to the said Francis Smedley, who then was the high-bailiff of the said court, to be executed in due form of law: that the said Francis Smedley, as such high-bailiff as aforesaid, and the said William Flack, who then was, and thence continually had been one of the bailiffs of the said court in the said warrant mentioned, in aid of the said Francis Smedley, *and by his command, then and there, and at and in the said [*199 court, and during the said sitting, and before the rising, and within the jurisdiction thereof, and within the time in the said warrant mentioned, under and by virtue of the said warrant, and in pursuance thereof, took the said Lawrence Levy, in order to deliver him, and did

then, and within the said jurisdiction, take and deliver him to the said A. F. Tracy, who then was, and thence continually had been the governor of the said house of correction in the said warrant mentioned, at the said house of correction : that the said A. F. Tracy then, and whilst the said warrant was in full force, and within the time therein mentioned, and within the jurisdiction of the said court, to wit, at the said house of correction, under and in pursuance of the said warrant, received and took the plaintiff into the said house of correction, and there safely kept him for a time within the said seven days, to wit, the time in the declaration and new assignment mentioned in that behalf, being a time within the period of imprisonment in the said warrant mentioned, and, in and about causing the plaintiff to be so arrested and committed, and detained in the said prison as aforesaid, under and by virtue of the said warrant in the said new assignment mentioned, the defendant Moylan did, as such judge as aforesaid, to a degree and extent necessary for that purpose, and no further or otherwise, and within the jurisdiction aforesaid, cause the supposed trespasses above newly assigned to be committed, doing no unnecessary hurt or damage to the plaintiff, and doing nothing but what was necessary to cause the plaintiff to be so arrested, detained, and committed as in that plea aforesaid ; which were the same trespasses above newly assigned against the defendant Moylan, and were committed within the jurisdiction of the said county-court,—verification.

*200] *To this plea, the plaintiff demurred specially, assigning for causes,—that the plea is uncertain and bad, in this, that it does not show in what manner the plaintiff insulted the defendant, whether by words or gestures or acts, or in what other manner ;—that the said defendant admits by his said plea that he caused the plaintiff to be imprisoned by means of the warrant in the said new assignment set out and mentioned, and which said warrant is bad on the face thereof, and not sufficient in law to justify the imprisonment or detention of the plaintiff, or the assaulting, seizing, or laying hold of him in the said new assignment and in the declaration above mentioned, and which said warrant so set out in the said new assignment as aforesaid appears to be bad in this, that it does not show in what manner the plaintiff insulted the defendant Moylan, whether by words or gestures or acts, or in what other manner ;—that the said warrant so set out in the said new assignment as aforesaid, contains no commitment of the plaintiff to the prison in the said warrant mentioned ;—that the said warrant is void and bad, in this, that it does not appear therefrom that there was any adjudication or order of the court in the said warrant mentioned for the commitment or imprisonment of the plaintiff for the time in the said warrant mentioned, the order for the said warrant mentioned being merely for an imprisonment until the rising of the court ; whereas the said warrant required that the plaintiff should be imprisoned for seven days, &c.

The demurrer was argued on the 24th of April last, before WILDE, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

S. Temple (with whom was *Archbold*), in support of the demurrer.(a)—The warrant in question is bad for *uncertainty. It is impossible to gather from it for what the plaintiff was ordered to be taken [*201 and detained. These warrants, like orders of commitment, must accurately define the cause of detention: *The King v. Evered*, Cald. 26, Ex parte Addis, 1 B. & C. 87 (E. C. L. R. vol. 8), 2 D. & R. 167 (E. C. L. R. vol. 16). There is a variance between the order of adjudication and the commitment. The clause upon which the judge professes to have acted, is the 113th section of the 9 & 10 Vict. c. 95, which enacts, “that, if any person shall wilfully insult the judge, or any juror, or any bailiff, clerk, or officer of the said court for the time being, during his sitting, or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison to which he has power to commit offenders under this act, for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding 5*l.* for every such offence, and, in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid.” The warrant must be in writing—*Mayhew v. Locke*, 7 Taunt. 63 (E. C. L. R. vol. 2), 2 Marsh. 377 (E. C. L. R. vol. 4),—and it must specify the nature of the offence, and show that the adjudication corresponds with it. “Every instrument,” says PARKE, B., in *Lindsay v. Leigh*, 17 Law Journ. N. S., Mag. Cas. 50, “which is to affect a man’s liberty or *property, out of the course [*202 of the common law, ought, on the face of it, to show the authority sufficiently. The *nature* of the insult offered to the judge should have been stated upon the face of the warrant. The law as to the form of commitment is thus laid down in *Hawkins*:(b)—“Fourthly, it ought to set forth the crime alleged against the party with convenient certainty, whether the commitment be by the privy council, or any other authority; otherwise, the officer is not punishable by reason of such *mittimus*, for suffering the party to escape; and the court before whom he is removed by *habeas corpus*, ought to discharge or bail him. And this does not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth that the court cannot adjudge whether it

(a) The argument was confined to the demurrers to the pleas of Smedley, Flack, and Tracy,—the defendant Moylan having died before the day of argument.

(b) Hawk. P. C. Book 2, ch. 16, § 16.

were a reasonable ground of imprisonment; as where one was committed for *manifest contumacy* to the high commission court, or for refusing to answer before them to certain articles,^(a) or for insolent behaviour, and words spoken at the council table,^(b) &c. And it is holden by Sir EDWARD COKE, in his 2d Institute, 2 Inst. 591, that a commitment for high treason, or felony in general, without showing the species of the offence, is not good." [TALFOURD, J.—The warrant here follows the very words of the act.] It may nevertheless be bad. This is a new jurisdiction and a new offence; and nothing will be intended in its favour: *Peacock v. Bell*, 1 Wms. Saund. 78. [WILDE, C. J.—Does "insult" necessarily import a contempt?] Not necessarily. PARKE, B., in delivering the judgment of the court of error, in *Gossett v. Howard*, 10 Q. B. 411, 452 (E. C. L. R. vol. 59), broadly lays down the distinction between *203] the process of courts acting under a common law authority, *and magistrates and others acting under a special statutory authority. "If," says his lordship, "this had been the case of a magistrate acting under some statute which gave him a special authority to take a man into custody under the same circumstances as are stated in the three first pleas, we should no doubt have agreed with Lord DENMAN and my brother COLERIDGE, that a warrant in a similar form would have been void, those circumstances not appearing upon the face of it; for, in the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them, by direct averment or reasonable intendment. Not so the process of superior courts acting by the authority of the common law." In Hale's *Pleas of the Crown*, vol. ii. c. 14, p. 122, it is laid down, that "the *mittimus* must contain the certainty of the cause, and therefore, if it be for felony, it ought not to be generally, *pro felonid*, but it must contain the especial nature of the felony briefly, as, *for felony for the death of J. S.*, or *for burglary, in breaking the house of J. S.*, &c., and the reason is, because it may appear to the judges of the King's Bench, upon an *habeas corpus*, whether it be felony or not." The word "therefore," in this warrant, must either apply to the last antecedent, in which case the detention of the plaintiff until the rising of the court would appear to be the cause of his committal to the house of correction; or it must refer to the whole of the matters previously stated, and in that case of the two causes for his committal, one would be insufficient; or it leaves the ground of committal uncertain: *204] and, in *either case, the warrant is bad, and, being bad upon the face of it, it affords the officers acting under it no protection.

(a) *Codde's Case*, 1 Roll. Rep. 245.

(b) *Chambers's case*, Cro. Car. 133, *Freeman's case*, Cro. Car. 579; *Hodges v. Humkin*, 2 Bulstr. 139.

Whateley (with whom was Sir John Bayley), for the defendants Smedley and Flack.—The warrant affords a justification to the officers who acted under it. That the judge of the county-court has power to commit a party for contempt, there can be no doubt. The county-court created by the 9 & 10 Vict. c. 95, is a court of record,—a court of co-ordinate jurisdiction: its process is not to be construed by the rules which govern the process of inferior courts. [CRESSWELL, J.—What marks the distinction between a superior and an inferior court?] An action lies in the county-court upon a judgment of the Queen's Bench or of this court—Com. Dig. *Prohibition* (A. 1); Anonymous, 1 Roll. Rep. 54; Anonymous, 2 Salk. 439; *Rance v. James*, 12 Jurist, 62; *In re Dunford*, 12 Jurist, 361; *In re Winsor v. Dunford*, 12 Jurist, 629: it has, up to a certain amount, co-ordinate jurisdiction with the courts at Westminster: and the proper mode of proving a judgment of a superior court therein, is, by *certiorari* and *mittimus*, as in the superior courts. The same construction, therefore, must be applied to this warrant, as to a warrant or order issued by *this* court. Even assuming it to be a warrant of an *inferior* court, it is a perfectly good warrant within the 113th section of the act. Though, perhaps, not so technically correct as it might have been, it is clear enough for the purpose. The high-bailiff is bound to execute the warrants of the judge—s. 38: it is no part of his duty to scan them rigidly. The cases of *The King v. Evered and Lindsey v. Leigh* do not touch the present; the former was the case of an alternative conviction, *which was clearly bad; and the latter [*205 turned upon the peculiar words of the act, and, besides, it was the case of a magistrate's conviction, which is construed strictly. Then, it is said that this warrant is bad, because it contains no adjudication of contempt. That, however, is not necessary. "It was a mistake," says PARKE, B., in delivering the judgment of the Exchequer Chamber, in *Gossett v. Howard*, 10 Q. B. 455 (E. C. L. R. vol. 59), "to assert, as was done at the bar, that an adjudication of a contempt was a necessary part of every committal for a contempt, and that an attachment would be invalid without it. It is not so in the superior courts of common law, as has been before stated; nor in the Court of Chancery, as Lord LYNTHURST has lately decided: *Ex parte Van Sandau*, 1 Phillips, 445, 605." In *Watson v. Bodell*, PARKE, B., says: (a) "It is clear that a court of record may commit by order to the custody of its officer in open court, as the Queen's Bench or Quarter Sessions, for, there is, or ought to be, a record of such commitment; and the order given *sedente curia* by the court in this case, would probably be a protection to the officer." *Ex parte Purdy*, 9 Com. B. 201 (E. C. L. R. vol. 68), is likewise an authority to show that a warrant like this is not to receive the same construction that a conviction receives. Besides, here, the warrant does contain a sufficient adjudication: it states that "Lawrence Levy

(a) 14 M. & W. 57, 70.†

did wilfully insult Dennis Creagh Moylan, Esq., the judge of the said court, during his sitting in the said court," and that "thereupon the said judge of the said court did order," &c. It is said that the particulars of the alleged insult should be stated. But, who is to be the judge of the insult? There are many cases where the party insulted alone could know the intention of the act, and where, as in the case of insulting

*206] gestures, it would be impossible to describe the offence by words.

And who but the judge is to say whether the act done be wilful or not? A case which occurred some years since, may be in the recollection of the court, where, a judge who had declined to fight a duel, was constantly annoyed by his challenger coming into court, and placing himself before him twirling a white feather between his thumb and finger. The judge,—who must have credit for possessing common sense, and whose duty it is to preserve the dignity of his court,—must surely be the proper person to determine what does and what does not amount to a wilful insult. In the Case of the Sheriff of Middlesex, 11 Ad. & E. 278, 296 (E. C. L. R. vol. 39), COLERIDGE, J., says: "When a court of competent authority has committed, the commitment is an adjudication, and the grounds of it need not be stated." In 1 Hale's Pleas of the Crown, p. 585, speaking of the examination of felons, the learned author says,—“If by some reasonable occasion the justice cannot at the return of the warrant take the examination, he may *by word of mouth* command the constable, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detainer is justifiable by the constable, or any other person, without showing the particular cause for which he was to be examined, or any warrant *in scriptis*.” Again, Vol. II. p. 122, he says: “The commitment must be in writing under the seal of the justice. And therefore, although a justice may, *by word of mouth*, arrest a person for a breach of the peace done in his presence, yet in that case the commitment of him ought to be a *mittimus* under seal: thus it was resolved in Sandford's case, P. 23 Car. 1, B. R. 1 Hale, P. C. 612; but, agreed, he may detain him in his custody till a warrant can be made.

*207] *And herein the power of a justice differs from the power of a court; for, the Court of King's Bench may commit by order, and so may the court of sessions of the peace, because there is, or ought to be, a record of the commitment.” And, after the passage which has been cited on the other side, the learned author adds,—“But, although it be true that these things are regular and fit, viz., the cause, the justice committing, the date, the apt conclusion, yet I am far from thinking the warrant void that hath not all these circumstances.”

Assuming that the warrant is not good, as regards the judge himself, that does not necessarily prevent its justification of the acts of his subordinates. It may be enough to say that the judge was acting in a judicial capacity, and therefore is not responsible, provided always he

acted *bonâ fide*: *Taaffe v. Downes*, 8 Moore's P. C. Cases, 36. If the complaint be, that this warrant is defective in form, that is aided by s. 136, which enacts "that no order, verdict, or judgment, or other proceeding made concerning any of the matters aforesaid, shall be quashed or vacated for want of form."

Ogle, for the defendant *Tracy*, submitted, that, if the judge had a right to commit, he, *Tracy*, had no discretion, but was bound to receive the prisoner, and therefore the warrant, which was good upon the face of it, afforded him ample justification.

Temple, in reply.—The passages cited from *Hale's Pleas of the Crown* relate to felony only. The officer is bound to inquire into the legal sufficiency of the warrant, before he ventures to enforce it. It cannot be denied that a court of record—a superior court—has power to commit for contempt, by the common law. *But an inferior court must, in exercising its powers, submit itself to the rules of law by which every inferior court is bound. The circumstance of writs of *certiorari* and prohibition being every day issued to these county-courts, shows that they are not superior courts, in the sense contended for on the other side. The warrant here is so uncertain upon the face of it, that it is impossible to say whether the commitment was for the supposed insult, or because the plaintiff had been ordered by the judge to be detained until the rising of the court. In the *King v. James*, 5 B. & Ald. 894 (E. C. L. R. vol. 7), 1 D. & R. 559 (E. C. L. R. vol. 16), the nature of the insult was set out in the warrant,—“for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him, as magistrates, in the due execution of our office as magistrates,” &c. The objection here is one of substance, and therefore is unaffected by the 136th section. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court:—

This case comes before the court upon a demurrer to the defendants' pleas. The action is for an assault and false imprisonment, brought against the late judge of the Westminster county-court, the high-bailiff of Westminster, and his deputy, and the keeper of the house of correction. The declaration is in the ordinary form.

The defendant *Moylan* died after the action was commenced; the other defendants justified under a warrant granted by the defendant *Moylan*, as judge of the county-court. The plaintiff specially demurred to the pleas of justification, and the demurrer was argued before us in Easter term last. The warrant is *set out in the pleas. Several causes of demurrer are assigned; but those relied upon on the argument, were,—first, that the supposed offence or ground of commitment, was, upon the face of the warrant, uncertain,—secondly, that the warrant recited “that the plaintiff had insulted the judge of the county-court, and had been taken into custody and detained till the rising of the court, and that therefore the officers were commanded to take the plaintiff, and convey him,” &c.

It was argued that the word "therefore" must apply either to the last matter recited,—in which case, the detention of the plaintiff till the rising of the court would appear to be the cause of his committal to the house of correction, which would be absurd; or it must refer to both the matters recited,—and then, of the two causes for his committal, one would be altogether insufficient; or it must leave the real ground of committal uncertain: and, in either case, the warrant would be bad, and, being bad on the face of it, would not justify the officers. It was also said that the warrant was bad in another particular, viz. that it did not set forth the nature of the supposed insult offered to the judge, so as to enable this court to ascertain whether any such insult had been offered as would give the judge power to commit.

On the other hand, it was said that the warrant must be read with reference to the 118th section of the 9 & 10 Vict. c. 95, which enacts, that, if any person shall wilfully insult the judge during his sitting in court, or other officers mentioned in the act, it shall be lawful for any officer of the court, by order of the judge, to take such offender into custody, and detain him until the rising of the court, and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit such offender to prison *210] for any time not *exceeding seven days; that the meaning to be ascribed to the warrant, then, was, that, the party having wilfully insulted the judge, and the judge having ordered him to be detained till the rising of the court, thought fit by warrant to commit him to prison for seven days; and also, that, with reference to the sufficiency of the description of the insult, the officers were at all events protected, as they could not dispute the propriety of the judge's decision; and that, even if the matter related to the judge himself, as defendant, the warrant would suffice, for, that his court was a court of record, and a superior court.

It is not necessary to decide this latter point: but there are strong reasons for saying that the courts held under the 9 & 10 Vict. c. 95, are inferior courts. Although courts of record, they are still in their nature(a) county-courts, which are undoubtedly inferior. Their jurisdiction is limited to the nature of the causes to be tried, and the ambit within which the cause of action must have arisen. And causes commenced there are removable into the superior courts, except in certain cases, where it is expressly prohibited by s. 94.

Assuming that the warrant in question is to be treated as having been issued by the judge of an inferior court, we, nevertheless, think it suf-

(a) As no analogy and no connexion, except in name, exists between the new county-courts and the *curia baronum* of the county in which justice is administered by the assembled tenants *in capite*,—the freeholders holding immediately of the crown,—with the assistance of the sheriff, presiding as the Queen's *bailliff* of the county, the new courts may have been thus designated for the purpose of fixing upon them the character of *inferior* courts. As to the distinction between superior and inferior courts, see *Peacock v. Bell*, 1 Wms. Saund. 73.

ficiently describes the offence for which the party was committed. In the first place, the recital that the party had insulted the judge, is to be treated as a direct adjudication that he had done so, according to the case of *The Sheriff of Middlesex*, 11 Ad. & E. 287 (E. C. L. R. vol. 39). *And, as the statute, by s. 113, gives the power to commit for any insult wilfully offered to the judge or his officers, or for any [*211 wilful interruption of the proceedings of the court, or any other misbehaviour in court; and, as many acts may come within that provision, which it would be impossible adequately to describe in words, it seems to us that the judge had jurisdiction to decide conclusively whether any particular act did amount to an insult or interruption or misbehaviour, and it was therefore unnecessary to say more in the warrant than that he had been wilfully insulted.

As to the cause of commitment, we adopt the argument urged for the defendants, that we are not, unless it be absolutely necessary, to construe the warrant so as to make it absurd and nonsensical; which we should do, in holding that it assigns the detention of the plaintiff till the rising of the court, as a cause for committing him to the house of correction. The recital of his detention is to be taken as a narrative of the judge, after the insult was offered, and not as a cause for the subsequent issuing of his warrant.

Both the objections taken to the warrant, therefore, fail; and our judgment must be for the defendants.

Judgment for the defendants.(a)

(a) See *Houlden v. Smith*, 19 Law Journ., N. S., Q. B. 170, 15 Law Times, 64. It was there held, that the judge of a county-court is not answerable at common law in an action of trespass, for an erroneous judgment, or for the wrongful act of his officer done not in pursuance of, though under colour of, his judgment; but that he is responsible in an action for an act done by his command and authority when he has no jurisdiction. In an action of trespass against A., the judge of the county-court of S., in Lincolnshire, to which A. pleaded only "not guilty," the facts were these:—

B. being resident and carrying on his business in Cambridgeshire, had been sued, by leave of the judge, in the county-court of S., where judgment was given against him by default. A summons under 9 & 10 Vict. c. 93, s. 98, was, *afterwards, and whilst B. resided and [*212 carried on his business in Cambridgeshire, issued by order of A., calling on B. to appear at the county-court of S., to be examined as to his not paying debt and costs, &c. This summons was served upon B. in Cambridgeshire, and on his non-appearance at S., the defendant, *bona fide* believing that he had power to do so, made a minute in his book ordering the plaintiff to be committed to Cambridge gaol, and he was so committed accordingly. It was held, that the commitment was without jurisdiction, and that the defendant must be taken to have been aware of the want of jurisdiction, and that he was therefore liable in trespass.

SPARTALI and Others v. BENECKE and Others.

A contract for the sale of thirty bales of goats' wool at a certain price per lb., contained the following stipulation,—“Customary allowance for tare and draft, and to be paid for by cash in one month, less 5 per cent. discount:”—Held, that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month.

Held, also, that, there being no ambiguity in the language of the contract, evidence was not admissible, to show, that, by the usage of the particular trade, vendors selling under such contracts, were not bound to deliver the goods without payment.

THIS was an action of assumpsit. The declaration stated that the defendants, on the 4th of February, 1848, agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, at their request, certain goods, to wit, thirty bales of goats' wool, upon the following terms, that is to say, at 1s. 6½d. per lb., the customary allowance for tare and draft to be made, and the said goods to be delivered by the plaintiffs to the defendants on the defendants paying the said price, less 5 per cent. discount, at or (at the option of the defendants) before the expiration of one calendar month from the day aforesaid: Mutual promises: Averment, that, although the plaintiffs, from the time of the making of the defendants' promise, for and during and until and at the expiration of one calendar month from the time of the making of the said contract, were ready and willing to deliver the said goods to the defendants, according to the said terms, and to perform and fulfil the said terms in all things on the part of the plaintiffs to be performed and
 *213] fulfilled,—whereof the defendants, *during all that time had notice; and although the said period of one calendar month had elapsed before the commencement of this suit; yet the defendants did not nor would accept the said goods from the plaintiffs, or pay them for the same, according to the said terms, but wholly neglected and refused so to do; whereby the plaintiffs necessarily incurred a great expense, to wit, 50l., in keeping the said goods, and in endeavouring to procure the completion of the said contract by the defendants; and thereby the plaintiffs had sustained a great loss, to wit, 500l., by reason of the fall in the market value of the said goods since the day when the said defendants ought to have performed their contract as aforesaid; to the damage, &c.

The defendants pleaded,—first, non assumpsit;—secondly, that the plaintiffs were not ready and willing to deliver the said goods to the defendants according to the terms of the said agreement, in manner and form, &c.;—thirdly, that they had not notice of the plaintiffs' readiness and willingness to deliver the said goods to the defendants, in manner and form, &c.;—fourthly, that, immediately from and after the making of the said agreement for sale, and for and during a reasonable time thereafter, they, the defendants, were ready and willing to receive and

accept from the plaintiffs the said bales of goats' wool, on the terms in the said agreement mentioned, and then, and within such reasonable time, to wit, on the 6th of February, 1848, requested the plaintiffs to deliver to them the said bales of goats' wool accordingly, but that the plaintiffs then wholly refused to deliver the said bales, or any of them, to the defendants, and then wholly discharged the defendants from accepting or receiving the same according to the said agreement; verification;—fifthly, that, after the making of the said agreement, and before any breach thereof, to wit, on the 6th of February, 1848, the *plaintiffs wholly absolved, exonerated, and discharged the defendants [*214 from the further performance of the said agreement on their, the defendants', part, and from their promise in that behalf; verification.

The plaintiffs joined issue on the first three pleas, and traversed the last two.

The action was brought to recover damages against the defendants for not accepting and paying for thirty bales of goats' wool sold by the plaintiffs to the defendants, through a wool-broker named Hughes, under the following contract:—

“London, 4th February, 1848.

“Bought of Spartali & Co., for account of Messrs. Benecke, Brothers, thirty bags of goats' wool,

“D. P. 30 £ , at 1s. 6 $\frac{1}{2}$ d. per lb.

“Customary allowance for tare and draft: and to be paid for by cash in one month, less 5 per cent. discount.

“Commission, $\frac{1}{2}$ per cent.

HENRY P. HUGHES.”

On the same day, the plaintiffs sent to the defendants an invoice of the goods, as follows:—

“London, 4th February, 1848.

“Messrs. Benecke, Brothers,

To Spartali & Lascaridi.

“For 30 bales of goats' wool 627 16 10

“Discount, 5 per cent. 31 7 10

£596 9 0

“Due, March 4th.”

The defendants demanded the goods on the 6th of February, but the plaintiffs refused to deliver them unless paid for. To this the defendants declined to accede; and they refused to take the goods after the expiration of the month.

At the trial, before TALFOURD, J., at the sittings in *London after last Hilary term, it was submitted, on the part of the plain- [*215 tiffs, that the meaning of the contract was that stated in the declaration,

viz., that the goods were to be paid for on delivery, but that the buyers were not bound to take them until the expiration of the month.

The defendants, on the other hand, insisted that they were entitled to have the goats' wool delivered to them at any time within the month, but that they were not bound to pay for it until the 4th of March.

The learned judge inclining to this latter opinion, the plaintiffs' counsel tendered evidence to show, that, by the usage of the trade, the vendors of goats' wool, under contracts worded like the contract in question, were not bound to deliver the wool without receiving the stipulated price. His lordship, however, seeing no ambiguity in the terms of the contract, declined to receive this evidence; and, accordingly, the plaintiffs were nonsuited,—leave being reserved to them to move to enter a verdict for 145*l.*, the amount of the ascertained loss on the re-sale of the wool, if the court should be of opinion that the learned judge had erroneously construed the contract.

Byles, Serjt., accordingly, in Easter term last, moved for a rule nisi to enter a verdict for 145*l.*, or for a new trial, on the ground of the non-reception of evidence. There is no stipulation in this contract, for credit. The goods are to be paid for *in cash* within a month. [TALFOURD, J.—I understood the contract to import a credit of a month. CRESSWELL, J.—When would the buyers be entitled to call for the delivery of the wool?] Perhaps immediately. [CRESSWELL, J.—Then, expanding the contract, we may read it thus,—to be delivered on demand, and to be paid for by cash in one month.] The plaintiffs would *216] not be bound to deliver within the *month, unless paid by cash. The question is, whether the common law right of the seller to keep his goods till payment of the price, is taken away by the language of this contract. [WILDE, C. J.—Certainly nothing is more common than to deliver the goods within the month, without payment. Suppose the bargain had been to “be paid for by bill at one month,” would the plaintiffs have had a right to retain the goods until the bill was paid?] Probably not. Then supposing the contract to be ambiguous, its meaning is to be ascertained by evidence of mercantile usage: notes to *Wigglesworth v. Dallison*, 1 Dougl. 201, 1 Smith's Leading Cases, 306, *Bold v. Rayner*, 1 M. & W. 343,† *Spicer v. Cooper*, 1 Q. B. 424 (E. C. L. R. vol. 41), *Robertson v. Jackson*, 2 Com. B. 412 (E. C. L. R. vol. 52), *Syers v. Jonas*, 2 Exch. 111.†

WILDE, C. J.—It appears to us, that, applying our judgment to the construction of this contract, and giving to its words their natural meaning, this is a present contract of sale, with a deferred day of payment, and that the purchasers were entitled to call for a delivery of the goods at any reasonable time within the month, without tendering the price. If a vendor agrees to sell for a deferred payment, the property passes,(a)

(a) Unless something with respect to the price to be paid, or with respect to the article to be delivered, remains to be ascertained.

and the vendee is entitled to call for a present delivery without payment. It is possible, however, that the words here used may have acquired a definite meaning the contrary of that which we infer from them: and, therefore, upon the assumption that evidence which was tendered to show that such was the case, had been improvidently rejected, the rule may go.

Crowder and Channell, Serjt., on a subsequent day *in the same term, showed cause.—The property in the goods passed to [*217 the defendants immediately on the sale. [WILDE, C. J.—The wool had to be weighed, and the value ascertained.] According to the terms of the contract, the delivery has nothing to do with the payment. [WILDE, C. J.—Until the weight, and consequently the price, had been ascertained, the defendants could not have brought trover.] Certainly not. This was a sale upon credit for one month, and not, as contended on the other side, for payment on delivery. According to *Webb v. Fairmaner*, 3 M. & W. 473,† the defendants had the whole of the 4th of March to make the payment; but they were entitled to have the goods delivered to them at any time within a month from the date of the contract. [WILDE, C. J.—It is not suggested that the money was payable before the 4th of March, unless the goods were delivered in the interim. The plaintiffs' contention is, that this was a sale on credit for a month, but with a lien on the goods until payment.] That is so. [WILDE, C. J.—The rule was granted solely on the rejection of evidence to explain the contract. No doubt, if there be any latent (a) ambiguity in the terms of the contract, parol evidence to explain it was admissible: as in *Smith v. Wilson*, 3 B. & Ad. 728 (E. C. L. R. vol. 23), where evidence was received to show, that, by the custom of a particular district, 1000 rabbits meant 1200, and *Doe d. Hall v. Benson*, 4 B. & Ald. 588 (E. C. L. R. vol. 6), where, rent being payable, on a demise by parol, from "Lady Day," evidence of the custom of the country was held admissible to show that the parties meant "Old Lady Day."] If the contract is plain and intelligible in itself, evidence cannot be received to contradict it. In *Hutton v. Warren*, 1 M. & W. 466,† PARKE, B., in delivering the judgment of the court, says: "It has been long settled, that, in commercial transactions, *extrinsic evidence of custom and usage is admissible to [*218 annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." So, in *Blackett v. The Royal Exchange Assurance Company*, 2 Tyrwh. 266, which was an action on a policy upon "*ship, &c., boat, and other furniture*," evi-

(a) Vide post, 227, n.

dence was offered, that it was not the usage of underwriters to pay for boats slung on davits on the larboard quarter, but was rejected at nisi prius, and the rejection confirmed by the Court of Exchequer,—Lord LYNTHURST, C. B., observing, that “usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain.” The reasons given for the judgment in *Syers v. Jonas*, do not operate at all upon this case. The attempt here is not merely to annex an additional term to the contract, but to alter the entire face of it,—to convert into a sale for ready money, that which in reality is a sale on credit. In *Ford v. Yates*, 2 M. & G. 549 (E. C. L. R. vol. 40), 2 Scott, N. R. 645, the defendant’s traveller entered and signed in the plaintiff’s order book a contract in the following terms:—“Of E. Yates, 39 pockets Sussex hops, Springett’s 5 pockets Kenward’s, 78s. Springett’s to wait orders.” In an action by the purchaser for non-delivery of the thirty-nine pockets,—it was held that parol evidence of the course of dealing between the parties, was not admissible to show that the sale was at a credit of six months. [WILDE, C. J.—Was that case cited in *Syers v. Jonas*?] It was not. [WILDE, C. J.—*It seems difficult to reconcile them.] In *Ford v. Yeates*, BOSANQUET, J., says: “Greaves v. Ashlin, 3 Campb. 426, appears to me to be a decisive authority to show that parol evidence cannot be received to vary terms that do appear on the face of the contract; though, according to *Jeffery v. Walton*, 1 Stark. N. P. C. 267 (E. C. L. R. vol. 2), where the memorandum is ambiguous (a) and imperfect, it may be aided by collateral matter.” [TALFOURD, J., referred to *Lewis v. Marshall*, 7 M. & G. 729 (E. C. L. R. vol. 49), 8 Scott, N. R. 477.] It is impossible to reconcile all the cases upon this subject: and, if the court feels itself called upon to elect between *Ford v. Yates* and *Syers v. Jonas*, it will pause before it comes to the conclusion that the latter was well decided. The words which were there introduced by evidence, “as per sample,” certainly gave the contract a totally different aspect. [WILDE, C. J.—There, the *written* contract would be satisfied by the delivery of *any* tobacco: the incident permitted to be annexed, entirely altered the thing sold. That case certainly cannot be reconciled with *Ford v. Yates*.] *Ford v. Yates* is directly in point here: and the reasons the Court of Exchequer professes to be guided by in *Syers v. Jonas*, are in precise accordance with the decision in *Ford v. Yates*. In the present case, if the parol evidence gives no fuller effect to the written terms, there is no necessity for it: and, if it does not give them a more extensive effect, then it varies them, and is on that ground inadmissible.

Byles, Serjt., and *Barstow*, in support of the rule.—*Syers v. Jonas* is decisive of the question. The point there was, whether evidence was admissible of the general custom in the tobacco trade, that all sales were understood to be by sample, though not so mentioned in the contract.

Tomlinson, in support of the negative *of that proposition, relied upon *Meyer v. Everth*, 4 Campb. 22, and *Trueman v. Loder*, 11 Ad. & E. 589 (E. C. L. R. vol. 39). PARKE, B., in the course of the argument, observes,—“In *Parke v. Palmer*, 4 B. & Ald. 387 (E. C. L. R. vol. 6), the words “by sample” are said to mean a mere collateral engagement on the part of the seller, that the commodity shall be of a particular quality. If they merely amount to a warranty, and not a condition of sale, there would be nothing inconsistent with the contract in admitting evidence of the usage.” And, after time taken to consider, the court came to the conclusion that the evidence tendered was admissible. That decision proceeds upon a sound and correct principle. In construing a will, regard is had to the state of the testator’s family: so, where the matter to be construed is a mercantile contract, you look at the surrounding circumstances, viz., amongst others, the custom of the particular trade. In *Ford v. Yates*, it is to be observed that TINDAL, C. J., who had received the evidence at the trial, rather defers to the judgment of BOSANQUET, J., and MAULE, J., than adopts their view with cordiality. [WILDE, C. J.—The doubt there was, whether the contract was complete *per se*; not, whether, if perfect, parol evidence was admissible to control it.] The question here is, whether we are not at liberty to expand this contract, by reading in the words—“or, if delivered within the month, on delivery.” In *Uhde v. Walters*, 3 Campb. 16, in an action on a policy of insurance on a voyage “to any port in the Baltic,” evidence was admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated by geographers as separate. [TALFOURD, J.—There, the evidence was admitted to apply a description used in the contract, not to vary it. *WILDE, C. J.—In the notes to *Wigglesworth v. Dalison*, Mr. Smith says: (a) “Evidence of usage, though [*221 sometimes admissible to add to or explain, is never so to vary, or to contradict, either expressly, or by implication, the terms of a written instrument;” for which he cites *Adams v. Wordley*, 1 M. & W. 374,† and *Magee v. Atkinson*, 2 M. & W. 440.†] Those cases are not at variance with this argument. The contract here is ambiguous and incomplete on the face of it.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

This rule, which was discussed on Saturday last, depends upon the question whether the evidence tendered at *nisi prius*, on the part of the plaintiff, was properly rejected.

The action is brought for the alleged breach of a contract for the purchase of a quantity of goats’ wool: and the only part of the contract which is material to the point in dispute, is, that which states the terms of payment. The words of the contract are—“to be paid for by cash in one month, less 5 per cent. discount.”

(a) 1 Smith’s Leading Cases, 309.

It cannot be doubted but that payment of the contract price at any time before the expiration of a month from the date of the contract, would be a performance of such contract; and, therefore, that no action would lie for the price until after the expiration of the month. The terms of the contract are unequivocal, and are those which are ordinarily used in mercantile contracts to express a sale upon credit; and they are almost identical with the words "payment to be made in two *222] months," which were used in the contract referred to in *the case* of *Webb v. Fairmaner*, 3 M. & W. 473,† and in which the court held that the two months were exclusive of the day of the date of the contract.

The question in this case, at nisi prius, was, whether the defendants, the buyers, were entitled to have the goods delivered to them at any time within the month, without paying for them; or, in other words, whether the vendor was entitled to a lien upon the goods until payment. My learned brother TALFOURD, who tried the cause, was of opinion that the contract imported a sale upon credit for a month, and that the buyer was entitled to a delivery of the goods at any reasonable time after the date of the contract, within the month, within the payment of the price; whereupon the plaintiff tendered evidence to prove, that, under contracts framed in terms similar to those in the present case, by the usage of the wool trade, the vendors were not bound to deliver the goods without payment. That evidence was rejected; and the question is, whether the evidence so rejected was admissible in point of law.

The rules of law relating to the admissibility of evidence of the usages of trade, to affect the construction of written contracts, are well settled; and the difficulty that has arisen respecting them, has been, in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved.

The rules of evidence applicable to the present case, are,—first, that, in mercantile contracts, evidence is admissible to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from the sense which they ordinarily import;—secondly, that evidence of usage is admissible for the purpose of annexing incidents to the contract in *223] *matters upon which the contract is silent*: but both these rules are subject to the limitation or qualification, that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, either expressly or by implication, the terms of the written instrument. This qualification of the rules referred to, is recognised in numerous cases, to some of which I shall advert. They are collected in *Smith's Leading Cases*, Vol. I., pp. 307—9. The question, therefore, is, whether the evidence tendered was admissible, within either of the rules before mentioned.

It is now undoubted law, that, by a sale of specific goods for an agreed price, the property passes to the buyer, and remains at his risk: (*a*) *Rugg v. Minett*, 11 East, 210; *Hinde v. Whitehouse*, 7 East, 558; and many other cases: and it is equally clear law, that, where by the contract, the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods, without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment: *Chase v. Westmore*, 5 M. & S. 180; *Crawshaw v. Homfray*, 4 B. & Ald. 50 (E. C. L. R. vol. 6); *Cowell v. Simpson*, 16 Ves. 275; and several other cases.

It was not contended that it could be shown that the words in this contract—"payment in a month"—were used in any sense in the trade which made the buyer liable to an action for non-payment of the price, until *after the expiration of a month from the date of the con- [*224 tract: and, indeed, the plaintiffs had distinctly shown their understanding of the contract, by a delivery of an invoice on the same day the contract was made, giving the weight, &c., of the goods, calculating the price, and deducting the discount of 5*l.* per cent. from the amount, and adding the words, "due 4th of March,"—the date of the contract being the 4th of February.

The only question which really arises in the case, is, whether the evidence was admissible within the rule, that, by proof of usage in the trade, an incident may be annexed to a written contract, upon a matter upon which the contract is silent. The objection to the admissibility of the evidence, is, that the incident sought to be annexed by such evidence, is inconsistent with, and contradictory to, the express terms of the contract, and is by those terms, if not expressly, certainly by implication excluded.

The contract states in terms the precise time when the price is to be paid—"in a month:" and, to require payment before that time, is obviously inconsistent with that stipulation; and the right to require such payment, if not expressly, was impliedly, excluded; and the authorities are decisive against such a claim.

The inadmissibility of evidence to vary the time of payment mentioned in agreements in writing, is illustrated by a numerous class of cases relating to bills of exchange and promissory notes made payable on days certain: *Adams v. Wordley*, 1 M. & W. 374; † *Foster v. Jolly*, 1 C. M. & R. 703; † *Free v. Hawkins*, 8 Taunt. 92 (E. C. L. R. vol. 3), 1 J. B. Moore, 535 (E. C. L. R. vol. 4); *Moseley v. Hanford*, 10 B. & C. 729 (E. C. L. R. vol. 21), 5 M. & R. 607; *Hoare v. Graham*, 3 Campb. 57; *Rawson v. Walker*, 1 Stark. N. P. C. 361 (E. C. L. R. vol. 2).

(a) Upon such a sale, the property sold is at the risk of the vendee, or, in other words, the vendor is discharged from his obligation to deliver the thing sold if it perish without his default. The modern doctrine, that the property passes by such sale, though originating in a mistaken supposition that the two propositions were identical, has been recently adopted in France.

That the rule is general, will also appear from decided authorities. In *Webb v. Plummer*, 2 B. & Ald. 746, the question was, whether the evidence *of custom and usage was receivable to support the plaintiff's demand. The plaintiff had held a farm, under a lease which contained a covenant that the lessee, or his assigns, should, at the end of the term, be paid for certain matters connected with the cultivation of the farm. The action was brought to recover a sum of money called foldage, being an allowance which, by the custom of the country, was payable to an outgoing tenant, but which was not mentioned in the covenant. The evidence was held to be inadmissible, upon the ground that the express stipulation for certain specified allowances, excluded any claim for any other matters, notwithstanding the general custom of the country: and BAYLEY, J., said, if the lease had been silent as to the terms upon which the tenant was to quit, the custom of the country might have been evidence in support of the right, but that the distinct mention of "some allowances" excluded others not named: and HOLROYD, J., said, that the provision that certain payments should be made, was equivalent to a declaration that no more should be made. In this case, the time of payment was expressly stated, and therefore the right to demand payment before that time is impliedly excluded. In *Hutton v. Warren*, 1 M. & W. 466,† evidence of usage was received in support of a claim by an outgoing tenant to be paid for seeds and labour bestowed on the land in the last year of the tenancy. It was so received, upon the ground that the evidence was not inconsistent with, or contradictory to, the terms of the lease under which the plaintiff held. It is clear that that decision was not intended to infringe upon, or extend, the established rules, or introduce any new exception, as the case of *Webb v. Plummer* was distinctly referred to and recognised; and in *226] the judgment it was said that the express *stipulation in *Webb v. Plummer* was equivalent to a stipulation that the things mentioned only should be paid for, and no more; and the evidence was admitted upon the ground that it could not be collected from the lease that the parties intended to exclude the customary allowances for seed and labour. In *Ford v. Yates*, 2 M. & G. 549 (E. C. L. R. vol. 40), 2 Scott, N. R. 645, the contract stated the price of the goods, but no time of payment: the court held that the contract enured as a sale for ready money, and therefore rejected evidence to show that it was a sale upon credit, by proving that the parties had always dealt upon a credit of six months, as being contradictory to the contract. And in *Greaves v. Ashlin*, 3 Campb. 426, the contract being for the sale of hops, but silent as to the time of delivery, evidence of the usage of the trade, that, under such form of contracts, the buyer was bound to accept and remove the goods immediately, was rejected.

The authority upon which the plaintiff relied, in support of the admissibility of the evidence, was, the case of *Syers v. Jonas*, 2 Exch. 111.†

That case was upon a contract for the sale of a specific parcel of tobacco, which made no reference to a sample: but evidence was received to prove, that, by the usage of the tobacco trade, all sales were by sample, whether the contract did or did not refer to sample. The evidence was received, upon the ground that the incident sought to be annexed, was not inconsistent with the contract, nor impliedly excluded by it: and the general rules laid down in former decisions were recognised and affirmed. And, in the judgment, it is expressly said, that evidence of established usage is admissible, not merely to explain the terms used in a contract, but to annex customary incidents, when it is not expressly or impliedly excluded *from the written instrument; and that [*227 the question was, whether the usage was excluded by implication, in the contract in question: and it was held that it was not, but that such usage was consistent with the contract.

Some remarks have been made as to the extent of the application of the rule by which a contract without a warranty, is transferred into a contract with a warranty, with all its important consequences. But, even if the application of the rule in that particular case could be questioned, it is a distinct authority in affirmance of the general rule: and we are more satisfied to decide this case upon the direct application of the undoubted rule of evidence to the facts of this particular case, then to resort to doubtful analogies: and we think that the admission of the evidence of the usage offered in this case, would be, to allow a right to be set up, inconsistent with, and contradictory to, the terms of the contract, and to annex an incident to the subject-matter, which, if not expressly, is clearly impliedly, excluded by the contract; and we therefore think the evidence was properly rejected, and that the rule must be discharged.

Rule discharged.(a)

(a) In wills and other instruments which the law requires to be in writing, a *latent* ambiguity may be explained by parol evidence, but a *patent* ambiguity cannot. In contracts not required to be in writing,—as, a contract for the hire of a horse,—a patent ambiguity resulting from an omission in the *written* agreement, may be supplied by parol: Jeffery v. Walton, 1 Stark. N. P. C. 267: *secus* of a contract which, as in the principal case, is required by the 17th section of the statute of fraude to be in writing: Greaves v. Ashlin, 3 Campb. 426. This distinction does not appear to have been adverted to in Ford v. Yates, *supra*, 219.

Where goods are sold for cash, the vendor need not deliver them till the cash is paid; but if he deliver them without payment, the property passes; and if the vendee afterwards refuse to pay, the vendor cannot maintain trover for the goods, unless they are obtained by the fraudulent contrivance of the vendee. Chapman v. Lathrop, 6 Cowen, 110. If the vendor rely on the promise of the vendee to perform the conditions of sale, and deliver the goods accordingly, the right of property is changed although the conditions be not performed. But where performance and delivery are understood by the parties to be simultaneous, possession obtained by artifice and deceit will not change

the property. Harris v. Smith, 3 Serg. & Rawle, 20. Where the terms of a sale are agreed on and the bargain struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. Goodrum v. Smith, 3 Humphrey, 542. As a general rule, where personal property is sold on credit, the vendee acquires the right of possession, unless there be some stipulation to the contrary. But if before the possession is delivered, the vendee becomes insolvent, the vendor may protect himself, if payment has not been made when the credit expired, by

refusing to deliver possession. And the fact that notes are deposited as collateral security if no money has been realized from them, will not change the rule. *Hunter v. Talbot*, 3 *Smedes & Marshall*, 754. Delivery under a contract of sale is not essential to pass the title to personal property as between the parties. *Hooban v. Bidwell*, 16 *Ohio*, 509; *Fraser v. Hilliard*, 2 *Strobhart*, 309; *Field v. Simcoe*, 2 *English*, 269; *Olyphant v. Baker*, 5 *Denio*, 379.

Where a sale of goods is made, to be paid for in cash or securities, and a delivery is made without payment, and without any demand of the price or securities, the delivery is absolute and vests the title in the vendee. Evidence of a usage that in such sales the vendor retained his lien until the conditions of the sale were complied with, was rejected, because such usage would be contrary to law. *Smith v. Lynes*, 2 *Sandf. Sup. Ct.* 203.

The true office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character; or to ascertain the true meaning of particular words in an instrument where those words have various senses. *The Reeside*, 2 *Sumner*, 569. Evidence of usage is not admissible to contradict or substantially vary the legal import of a written agreement. *Renner v. Bank of Columbia*, 9 *Wheat*, 581; *Rankin v. American Insurance Co.*, 1 *Hall*, 619; *Steght v. Rhineland*, 1 *Johns*, 192. The right of a tenant holding under a lease, to take the straw growing upon the land, depends upon the contract, which cannot be varied in its construction by evidence of a custom or usage. *Iddings v. Nagle*, 2 *Watts & Serg.* 22. Where the wages of seamen appear by shipping articles, evidence of a further compensation by way of customary privilege cannot be received. *Bogert v. Cauman*, *Anthon*, 70. In an action for labour on a vessel built by several owners, against one of them, evidence of the usage of the place "that the owners were not jointly liable for materials and labour for the vessel, and that no one was authorized to make contracts for materials and labour for the vessel so as to bind the owners generally," is inadmissible. *Leach v. Perkins*, 5 *Shepley*, 462. A bill of exchange drawn upon and accepted by the cashier of a bank, and payable to order at a certain time after date, is entitled to grace. Evidence of local usage cannot be received to the contrary. *Merchants' Bank v. Woodruff*, 6 *Hill*, 174. Where a stipulation that all claims for damages must be made within three days was a part of a contract of sale, evidence to prove that according to the custom of trade in Boston, goods were returned by purchasers at auction, and received by the owners, and an allowance made after the expiration of three days, if within a reasonable

time after the sale, was held inadmissible. *Atkins v. Howe*, 18 *Pick.* 10. Evidence is inadmissible to prove a usage in the port of Boston that where a cargo of corn is sold in bulk, lying in the vessel in which it is imported, and the sale is made under a warranty, the purchaser receives and retains so much of the corn as answers the warranty, and rejects the residue, which, upon such rejection, becomes the property of the seller. *Clark v. Baker*, 11 *Metcalf*, 186. Where a policy of reinsurance provides for an indemnity to the reinsured, and its terms are not ambiguous, evidence of a local custom among insurers, to pay only such a proportion of the loss as the amount of reinsurance bears to the original policy, cannot be received to control the contract or reduce the amount of a recovery thereon. *Mutual Safety Ins. Co. v. Hone*, 2 *Comstock*, 235. In an action on a written contract to deliver "Rochester City Mills" flour, for a failure to deliver it, where it appeared that the contractors offered to deliver flour of as good quality, but refused the Rochester brand, it was held, that evidence was inadmissible to prove a usage to the effect that contracts to deliver flour of a particular brand may be satisfied by a delivery of flour of equal quality of a different brand. *Beals v. Terry*, 2 *Sandf. Sup. Ct.* 127. A local usage cannot be considered a part of a contract, when it contradicts that contract. *Sweet v. Jenkins*, 1 *Rhode Island*, 147.

But evidence of usage, fixing a construction of the words "inevitable dangers of the river" in a bill of lading for transportation of goods by inland navigation, was held admissible. *Gordon v. Little*, 8 *Serg. & Rawle*, 533. Evidence of a custom affecting a contract in a matter in which the contract is silent, is admissible. *Cooper v. Kane*, 19 *Wendell*, 386. Evidence of custom is admissible to explain an ambiguity in a written contract. *Shaw v. Mitchell*, 2 *Metcalf*, 65. Where a new and unusual word is used in a contract, or where a word is used in a technical or peculiar sense, as applicable to any trade or branch of business or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it. *Eaton v. Smith*, 20 *Pick.* 150. In an action by merchants in Kentucky against commission merchants in New Orleans, for the proceeds or value of goods consigned to them for sale, on which they had made advances, and as to which there was no special agreement, it was held, that it was competent for the defendant to prove that it was the custom of that city for merchants who had made advances on goods consigned to them from other states, to ship them to foreign ports for sale; and by such proof to affect the amount of recovery or defeat the action. *Wallace v. Bradshaw*, 6 *Dana*, 382. In bills of lading, where the terms used have by usage acquired a particular signification, the parties will be presumed to have

used them in that sense. *Wayne v. Steamboat General Pike*, 16 Ohio, 421. The clear and explicit language of a contract may not be enlarged or restricted by proof of a custom or usage; yet in applying the contract to its subject-matter, or bringing it to bear on any par-

ticular object, the customs and usages of trade are admissible to ascertain what subjects were within, and what were excluded from its operation. *Hone v. Mutual Safety Ins. Co.* 1 Sandf. Sup. Ct. 137.

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***The Mayor and Commonalty and Citizens of the City of LONDON v. WILLIAM PARKINSON and Others. [*228**

Patent fuel,—an article composed of coal-dust, mixed with 13 per cent. of pitch and lime,—is not liable to the duties imposed upon "coals" imported into the port of London, by the statute 1 & 2 W. 4, c. lxxvi. ss. 23, 60 (continued by the 1 & 2 Vict. c. ci. and 8 & 9 Vict. c. ci.),—notwithstanding that there is no purpose to which ordinary pit-coal can be applied, to which coal-dust, without the admixture of pitch and lime, could not also be applied.

THIS was an action of debt. The declaration contained two counts. The first count alleged that the defendants, being the owners of a ship called *The Countess of Malmsbury*, laden with coals, did bring the said ship, so laden, into the port of London, and did there break bulk without paying the duties of 1*d.* and 12*d.* per ton payable to the plaintiffs in respect of all coals imported into London; whereby the defendants became liable to pay the duties, amounting to 9*l.* 4*s.* 2*d.*, in respect of the said cargo. The second count was to the same effect, in respect of a subsequent cargo brought into London by the same vessel. The defendants pleaded never indebted. Issue having been joined, the cause came on for trial before the lord chief justice and a special jury, at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiffs, by consent, subject to the opinion of the court upon the following case:—

The duties sought to be recovered by this action, are imposed by statutes 1 & 2 W. 4, c. lxxvi., ss. 23 and 60, continued by 1 & 2 Vict. c. ci. and 8 & 9 Vict. c. ci. Copies of those acts accompanied the case, and were to be taken as part thereof.

The defendants were the owners of the ship mentioned in the declaration, and did, on the 21st of October, 1845, and again on the 18th of November, 1845, bring cargoes of fuel by that vessel into the port of London, and did, on those occasions, break bulk, and *discharge [*229 the cargoes, without paying the duties mentioned in the declaration. The foregoing facts were admitted at the trial; and the only question made, was, whether the fuel so imported was or was not subject to the said duties.

The plaintiffs called as witnesses at the trial, three practical chemists,—Professor Brande, Mr. Francis, and Mr. Cooper. They proved that samples of the cargoes had been given to them, and that they had submitted the same to several tests. By digesting different portions in

ether, they found the article to consist of coal-dust, or small-coal, with coal-pitch. The proportions, according to their evidence, varied in the several portions, from 91 to 95 per cent. of coal-dust, or small-coal, the remainder being coal-pitch. They subjected the coal-dust, or small-coal, so obtained, to various experiments, and ascertained that it contained all the ingredients and properties of ordinary pit-coal, and in about the same quantities and proportions. They stated, that, in their judgment, the addition of coal-pitch to the coal-dust, or small-coal, did not produce any chemical change in the coal, but merely acted as a cement, to glutinate the small particles of coal, so as to make them adhere to each other; and that there was no purpose to which the ordinary pit-coal could be applied, to which the coal-dust or small-coal obtained by them from the samples, could not also be applied; that, in their judgment, if, in combining the coal-pitch with the coal-dust, or small-coal, the substance were passed through a heated cylinder, heated to a great heat, sufficient to throw off a considerable quantity of flame and yellow vapour, such vapour would be the vapour of coal-tar. They also stated, that, in the coal-dust, or small-coal, obtained by them from the samples, there was rather more sulphur than is usually found in good ordinary coal.

*230] *Neither Professor Brande nor Mr. Francis looked for lime amongst the composite parts, in their analysis, further than examining the coal-dust, or small-coal, obtained by them, through a magnifying glass; and they discovered no lime. Mr. Cooper had not tested for lime. He had burnt the coal-dust, or small-coal, and had examined the ashes; and he found lime, silica, alumina, chloride of lime, and phosphate of lime, all taken together, amounting to the proportion of $1\frac{8}{10}$ per cent. Mr. Cooper also stated that the samples taken from the cargoes varied in composition; some portions of the same sample being very friable and easily crumbled to powder, whilst others were firmer, and more compact. He also stated as one reason, amongst others, for thinking that the coal-dust, or small-coal, had not been exposed to a sufficient heat to produce any chemical change in the coal, that the angles of the particles of coal found by him in his analysis, remained quite sharp; and that if the coal had been subjected to heat sufficient to produce a chemical change, a partial fusion would have occurred, and, instead of remaining sharp angles, the edges would have been rounded.

It was also proved at the trial, that the coal which is raised from the pit in the counties of Durham and Northumberland, is screened in the first instance, and, by such screening, the large and more valuable coals are separated from the small coals. The small coals are then screened a second time through a finer screen or sieve, and the coal-dust, or duff-coal, is separated therefrom. Large heaps of this duff-coal, or coal-dust, are to be seen near the pit's mouth, in most of the collieries in the counties before mentioned, and, in many instances, on fire,—the heaps,

after a time, spontaneously igniting. The duff, or coal-dust, is rarely used, except for burning lime, making bricks, or producing *gas, [231 or the like: but it is frequently used for those purposes; and, during the last few years, it has been imported into London.

Witnesses were also examined, on the part of the plaintiffs, who had been engaged in the coal trade for many years; and they stated that, in their judgment, the article of which the cargoes in question were composed, was coal cemented together by gas-tar or pitch, but containing all the properties of coal; and that, except in being so cemented, they knew of no difference between it and common coal. No one of the plaintiffs' witnesses had seen the article manufactured.

Samples of the fuel were produced and shown to the jury; and also the pieces of coal-duff, or coal-dust, which remained in substance after the coal-tar or pitch had been disengaged by the process of analyzation. The coal-tar, or pitch, which had been separated by the process, was likewise produced and shown to the court and jury.(a)

The defendants called Mr. James Gordon as a witness. He stated that he was manager for the defendants at their manufactory in Newcastle-upon-Tyne, where they carried on business under the name of The Wylam Patent Steam Fuel Company; and that the article of which the cargoes in question were composed, was made at the defendants' manufactory, where a similar article had been made since the latter end of 1843, when it was first manufactured: that the witness superintended the process: that the component parts were, coal-duff, or dust, coal-pitch, and lime,—the proportions being 87 of coal-dust, 10 of pitch, and 3 of lime: that the coal-duff, or dust, is delivered to the defendants at their works in Newcastle, and, including all expenses, *it costs [232 them, when at their works, 3s. per ton: that the defendants buy coal-tar in London, and the cost to them, when delivered at their works in Newcastle, is about 2d. per gallon. The coal-tar so bought is placed in a boiler holding 5000 or 6000 gallons, and is there boiled until the naphtha and other volatile products are evaporated. The residuum is the coal-pitch. The pitch is allowed to stand to cool for a short time, and is then run out on large floors which are coated with whitewash of lime, on which it remains until it is quite cold and brittle. The pitch, when taken from the floors, brings with it a portion of the coating of the lime. The lime is used to prevent the fuel from forming clinkers in burning; and it is then ground into a fine powder between stones. The powdered pitch and the coal-duff are then so placed as to be exposed to the action of a double chain of buckets or elongators, which is worked like a dredging-machine, by steam. The buckets differ in size, and are so worked that they raise the coal and pitch, in the required proportions, to a considerable height, and then discharge the same into

(a) The samples were in court, and were agreed to be referred to by either party upon the argument of the case.

an open box or hopper, in which is a shaft, armed with nails, revolving at a rapid rate, which mixes the coal and pitch. The composition so mixed, then passes between rollers, the aperture between which may be widened or narrowed at pleasure, according as it is wished to pass the composition slowly or quickly; and from thence it is precipitated into a horizontal cylinder at one extremity thereof. The cylinder is fifteen feet long, and thirteen inches in diameter. It is heated to nearly a red heat. Inside the cylinder, and running the whole length thereof, is a screw, which revolves by steam power, and by its action forces the composition through the cylinder, and out at the opposite extremity from that at which it enters. The cylinder is set upon an arch, cased over *233] with brickwork, to prevent any undue action *of the fire on the metal of which the cylinder is composed; and under the arch there is a fire, which rises through small holes into the arch, and thoroughly heats the cylinder. At the top of the cylinder, there are five small flues, through which a vapour rises, and passes into the main flue; and, whilst the machinery is in action, a yellow flame is visible at the mouth, as well of the small flues as of the large flue. The object of passing the composition through the cylinder, is, to drive off the sulphur, and to mix the articles, and render them fit for moulding. The effect produced on the composition, is, that it passes out of the extremity of the cylinder in a heated plastic state, capable of being moulded into any shape. The screw forces the composition out of the cylinder on an endless chain or belt of iron, which has a very rapid motion, and delivers the same in a heated state into a cylinder or pug-mill, in which is an upright shaft, armed with blades, which press the composition down into a chain of moulds, shaped to about the size of an ordinary brick, ready to receive the same. On each side of the pug-mill is an hydraulic press. One press compresses each brick with a power equal to about fifteen tons; and, after the chain of moulds has passed round, the other press punches each brick out upon a carrying belt of iron, which conveys it to the other warehouse on the quay, convenient for shipment. There it is allowed to remain for ten or twelve hours, to cool and harden, before it is in a fit state for shipment. Each brick of the fuel so made weighs about 14 lbs.(a) The machinery of the defendants used for the purpose aforesaid, has been erected at an expense of about 40,000*l.*, including the cost of the buildings and premises. Various improve- *234] ments in the machinery have been made within *the last two or three years. Two steam-engines and thirty cylinders are used by the defendants in the manufacture.

The fuel is now in extensive demand, for steamboats and other purposes; and much of it is exported. A ton of coal occupies forty-five cubic feet, a ton of fuel about thirty or thirty-one feet. As much heat may be obtained in a steam-engine from eighteen hundred weight of

(a) A specimen brick of the fuel was produced at the argument.

fuel, as from a ton of best Newcastle coal. The selling price of it in London is about 20*s.* per ton.

The defendants also called as a witness, Mr. William Wallis, the superintendent of The Diamond Gravesend Steam-Packet Company, who proved, that, for the last twelve months, the fuel in question had been used in the boats of that company. Prior to that time, the company had used ordinary coal—both Welsh and Newcastle coal. The fuel in question produces less smoke than the Newcastle coal, but more than the Welsh coal. The cost of Welsh coal is about 21*s.* 6*d.* per ton; of Newcastle, 18*s.*; and of the fuel, 20*s.* As to the production of heat and steam, the fuel was about equal to the Welsh coal, but superior to the Newcastle coal. Also, in using the coal, clinkers formed on the bars of the fire-place, which caused inconvenience; whereas, very few, if any, clinkers formed on the use of the fuel. The fuel also has an advantage over ordinary coal, in stowage. The witness also considered the fuel quite different from ordinary Newcastle coal, in this, that it is cleaner; the consumption is not so great; it generated steam more easily; and occasioned less soot: it also burns to quite a dust.

The defendants also called Mr. John Napier, who is a steamboat builder, and also the proprietor of several steamboats, who had had experience in the use of the fuel for twelve months, and who confirmed the *evidence of Mr. William Wallis, in the several particulars afore- [*235 said.

The court is to draw any inference of fact which might be drawn by a jury.

The question for the opinion of the court, is, whether the fuel imported into London by the ship in the declaration mentioned, was chargeable to the duties mentioned in the declaration. If the court shall be of opinion that the fuel was so chargeable, then the verdict for the plaintiffs is to stand: but, if the court shall be of opinion that the fuel was not so chargeable, then the verdict is to be entered for the defendants.

Channell, Serjt. (with whom was *Hugh Hill*), for the plaintiffs. (a)—'The duties in question are imposed by the 1 & 2 W. 4, c. lxxvi. ss. 23, 60. The last-mentioned section, reciting two charters of James 1, the first bearing date the 20th of August, 3 Jac. 1, the other the 15th of December, 12 Jac. 1, and the statutes 5 & 6 W. & M. c. 10, 19 G. 2, c. 8, and 10 G. 4, c. cxxxvi., imposes a duty of 12*d.* for every ton of "coals, cinders, and culm, imported or brought into the port of London." The question here is whether the cargoes in question are substantially cargoes of coal, and subject to this imposition. The evidence of the witnesses upon the one side and the other is somewhat conflicting as to the proportions of the component parts of the article: but all agree that 87

(a) The point marked for argument on the part of the plaintiffs, was,—That the fuel imported into London, as stated in the case, is chargeable to the duties mentioned in the declaration, under the statute 1 & 2 W. 4, c. lxxvi. ss. 23 and 60, continued by the 1 & 2 Vict. c. ci., and 8 & 9 Vict. c. ci.

per cent. at the least remains *coal*, without undergoing any chemical change whatever. The plaintiff's witnesses show that *all the *236] ingredients which are to be found in pit-coal are to be found here; and that the defendants' manufactured fuel has all the properties of pit-coal, and is useful for all the purposes for which pit-coal is used. [CRESSWELL, J.—So is wood in many places.] Coal-dust is coal. [CRESSWELL, J.—No doubt: but the question is, whether it is chargeable to the duty under these acts. WILDE, C. J.—If the admixture of any foreign substance will render coal exempt from duty, very little coal will be imported in its natural state.]

Willes (with whom was *Cowling*), for the defendants.(a)—The question is, how far the article in dispute is different from the coal-dust out of which it is manufactured. Assuming that the process it undergoes imparts to it no chemical change, it is clearly a different thing from that upon which the duties claimed were imposed. The legislature never meant to impose this duty upon a manufactured article, but only upon the natural production which had before been the subject of legislation and imposition. At all events, thirteen per cent. of the article is not coal: and the value is greatly enhanced by the process it is subjected to. In its manufactured state, it is applicable to purposes wholly different *237] from those to which coal-dust is *applicable. [CRESSWELL, J.—Suppose this were an *ad valorem* duty, would the duty be charged upon the value of the coal-dust, or upon that of the manufactured fuel?] Clearly upon the latter, if it were liable at all. [WILDE, C. J.—No doubt, the intention of the legislature was, to tax *coals*. If the article in question is taxed, you tax *labour* to a greater degree than you tax *coals*. It would have been better if the case had stated the value of "coal-dust" when imported into the port of London.] This fuel is clearly not within the terms used in the act. If there be any doubt, it can only be resolved by the legislature.

Channell, Serjt., in reply.—The object of the statutes was two-fold,—to raise a revenue for the city of London,—and to prevent frauds in the vend of coal. If coal-dust were imported as such, it clearly would be chargeable with duty. It is true, that, to charge this article with duty, will be to tax labour to a certain extent: but, if the defendants choose to import that which is substantially coal, they must take the consequences. [TALFOURD, J.—Would an indictment for stealing "coals" be sustained by evidence of the stealing of patent fuel?] Probably not. That, however, is not a fair test.

WILDE, C. J.—The question raised in this case depends upon the

(a) The points marked for argument on the part of the defendants, were as follows:—The defendants will argue that the fuel imported into London, as stated in the case, is not chargeable to the duties mentioned in the declaration, under the statute 1 & 2 W. 4, c. lxxvi. ss. 23 and 60, continued by 1 & 2 Vict. c. ci., and 8 & 9 Vict. c. ci.,—because the fuel, though made out of coal-dust, is not "coal;"—because the statutes apply only to things known when they were passed;—because the statutes do not apply to an article of manufacture;—and because the fuel is really and *bona fide* a different thing from mere coal, and the question how far different is immaterial.

construction of an act of parliament, to many of the provisions of which our attention has not been called, it may be convenient to refer to the act, before we give our opinion. We will, therefore, look into it.

CRESSWELL, J.—It appears that this duty is substituted for a metage duty. It may be a question how far an article of this description would be liable to metage. *Cur. adv. vult.* [*238]

WILDE, C. J., now delivered the judgment of the court:—(a)

This was an action of debt brought against the defendants as owners of a ship called *The Countess of Malmesbury*, to recover a sum of money for duties alleged to be payable in respect of a cargo of coals imported in that ship into the port of London, and delivered there.

The defendants pleaded that they never were indebted; whereupon issue was joined.

The cause came on for trial, before the lord chief justice of this court, at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiffs, by consent, subject to the opinion of the court on a special case. The case was argued before the lord chief justice, CRESSWELL, J., WILLIAMS, J., and TALFOURD, J., in Easter term last, when the court took time to examine the statutes referred to: and we are now of opinion that the article called "*Patent Fuel*," which was imported in *The Countess of Malmesbury*, does not come within the meaning of the word "*coals*," as used in the statute whereby the duty was imposed.

It is true that the patent fuel is composed chiefly of coal-dust; but, in order to make it merchantable as fuel, it is necessary to mix the coal-dust with a certain quantity of pitch and lime; and, although the proportions of those ingredients are small, as compared with the coal-dust, it was admitted that they were really necessary, and were not introduced for the purpose of evading the duty. And, although it may be true, as stated by the scientific witnesses examined on behalf of the plaintiffs, that there is no purpose to which ordinary pit-coal can be applied, to which coal-dust could not also be applied; yet it is manifest that the latter would be applied at so great a disadvantage as to be almost worthless: whereas, mixed with the pitch and lime, and having undergone the process described in the case, it becomes for many purposes more valuable than ordinary coal. The fact, therefore, of the coal-dust being so applicable, does not, in our opinion, decide the question. [*239]

In construing the act of parliament imposing the duty, we must assume that the word "*coals*" is used in its ordinary popular sense, and must see whether the article in question comes within its meaning, according to that criterion.

If a person were to order of a coal-merchant a quantity of coals,

(a) The case had been argued in Easter term last, before WILDE, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

would that order be complied with by the delivery of the patent fuel? Surely, no one would contend for the affirmative. Or, if a vendor were to contract to deliver coals of any description named by the purchaser, could he be called upon to deliver patent fuel? We apprehend that he could not. Another criterion for ascertaining the meaning of the word "coals" in the section imposing the duty, may be found in the sense which the legislature appears to have ascribed to that word in other parts of the act. Thus, in section 43, enacting that all coals, cinder, and culm shall be sold by weight,—in section 45, imposing a penalty upon parties knowingly selling one sort of coals as and for a sort which they really are not,—in section 47, enacting that a seller's ticket shall be delivered with any quantity of *coals* exceeding 560 lbs.,—section 48, that coals shall be delivered in sacks each containing a certain weight,—*240] section 75, requiring the *seller to send a certificate to the coal-exchange,—and several others; it appears that the legislature used the word "coals" as describing the article in its natural state as dug from the pit; for, the provisions are so far appropriate, but are inapplicable to the article in question.

It is true, as was observed in argument, that those sections are introduced for the purpose of protecting buyers against frauds; but they are to protect them against frauds in the sale of *coals*; and the duty is imposed on *coals* imported into the port of London. Why should we give a different meaning to the same word in different sections, for the purpose of extending the operation of a clause imposing a tax?

We think, therefore, that we ought to construe the word according to its ordinary meaning; which will make the different parts of the act consistent with each other; and that, consequently, the defendants were not liable to pay the duty declared for, and that the *postea* must be delivered to them.

Postea to the defendants.

Laws imposing duties are not construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations. *Adams v. Bancroft*, 3 Sumner, 384; *Bend v. Hoyt*, 13 Peters, 283.

*241]

*ELVES v. CROFTS. June 24.

A butcher, on assigning, for the residue of a term, certain premises upon which he had carried on his business, together with the fixtures and the *good-will* of the trade, covenanted with the purchaser that he would not at any time thereafter, either by himself, or as agent or journeyman for another, set up, exercise, or carry on, or be employed in, the trade or business of a butcher, within five miles from the premises thereby assigned:—

Held, not an unreasonable restraint, either in respect of time or in respect of distance; and that the covenant did not cease to be a binding covenant, on the expiration of the term, or on the covenantee's ceasing by himself or his assigns, to carry on the business assigned.

THIS was an action of covenant. The declaration stated, that, by a

36 Am. 66; 24 C. C. 63.

certain indenture, bearing date the 28th of October, 1842, and made between the plaintiff and the defendant, whereby the plaintiff had contracted with the defendant for the purchase of a certain messuage and premises, for the residue of a certain term of twenty-one years, together with, amongst other things, the good-will and custom of the business of a butcher, which, for some time previously, and up to the date of the said indenture, had been carried on by the defendant at or upon the said premises, the defendant did, for the consideration in the said indenture mentioned, covenant and agree with the plaintiff, that he, the defendant, would not carry on the trade of a butcher within five miles from the said premises, &c. The declaration then proceeded to allege, that, in breach of the said covenant, the defendant did, on the 1st of January, 1844, &c., carry on the trade of a butcher within five miles, &c.

The defendant craved oyer of the indenture, which was set out, as follows:—

“This indenture, made the 28th of October, 1842, between James Crofts, of No. 103, Drury Lane, in the county of Middlesex, butcher, on the one part, and Thomas Elves, of No. 103, Drury Lane aforesaid, butcher, of the other part: Whereas, by indenture of *lease, [*242 bearing date the 21st of July, 1825, and made between the Rev. Thomas Roy and Martha his wife, and John Austen (therein respectively described), of the one part, and James Dibble (therein, also described) of the other part, all that messuage or tenement situate, standing, and being on the east side of Drury Lane, in the parish of St. Clement Danes, in the county of Middlesex, numbered 103, in the same lane, with the appurtenances, was demised to the said James Dibble, his executors, &c., from the 24th of June then last, for the term of twenty-one years, subject to the rent therein reserved, and to the covenants and agreements on the lessee's part therein contained: And whereas, by divers mesne assignments, &c., the said messuage and premises demised by the said recited indenture of lease, with their appurtenances, were assigned to the said James Crofts for the then residue of the said term: And whereas the said Thomas Elves hath contracted with the said James Crofts for the purchase of the said messuage and premises for the residue of the said term, together with all tenants' fixtures therein, and the good-will and custom of the business of a butcher, which for some time previously, and up to the date of these presents, has been carried on by the said James Crofts at or upon the said messuage and premises, with the several implements and other articles and things used in the same business, at or for the price or sum of 200*l*.: Now, this indenture witnesseth, that, in consideration of the sum of 200*l*. of lawful money of Great Britain to the said James Crofts in hand well and truly paid by the said Thomas Elves at or immediately before the sealing and delivering of these presents, the receipt whereof the said James Crofts doth hereby admit, &c., by these presents, he, the said James Crofts, hath granted, bargained, sold, and as-

signed, and by these presents doth grant, bargain, sell, and assign to the
*243] *said Thomas Elves, his executors, &c., all that messuage or tenement and other premises mentioned and comprised in, and demised by, the said recited indenture of lease, with their appurtenances, and all the estate, right, title, term of years yet to come and unexpired, property, claim, and demand whatsoever, both at law and in equity, of him the said James Crofts, in, to, or out of the same, together with the said recited indenture of lease, and all assignments thereof respectively,—to have and to hold the said messuage or tenement and premises hereby assigned, or intended so to be, with the appurtenances, to the said Thomas Elves, his executors, &c., henceforth, for all the residue now to come and unexpired of the said term of twenty-one years created by the said recited indenture of lease, and for all other the estate, term, or interest of him, the said James Crofts, in the same premises; subject, nevertheless, to the payment of the rent reserved by the said indenture of lease, and to the observance and performance of the covenants and agreements therein contained, and which henceforth, on the part of the lessee or assignee, are or ought to be paid, observed, and performed: And the said James Crofts doth hereby, for himself, his heirs, &c., covenant with the said Thomas Elves, his executors, &c., in manner following, that is to say, that, notwithstanding any act or deed whatsoever by the said James Crofts done or committed to the contrary, the said recited indenture of lease is a good and subsisting lease, valid in law, and not forfeited or otherwise determined or become void or voidable, and that the yearly rent in or by the said indenture of lease reserved, and all arrears thereof, and also the land-tax, sewer-rate, and all other taxes, rates, and assessments chargeable on the said premises, or on the tenants or occupiers thereof for the time being, for or in respect of the
*244] same, have been fully paid and *satisfied up to the 29th of September last; and that the several covenants and agreements on the part of the lessee or assignee therein contained have been well and truly observed and performed down to the day of the date hereof; and that he the said James Crofts hath full right, title, and authority to assign the said messuage and premises thereby assigned, or intended so to be, with the appurtenances, to the said Thomas Elves, his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents: And, further, that it shall be lawful for the said Thomas Elves, his executors, &c., at all times during the residue of the said term of twenty-one years, to hold and enjoy the said messuage and premises, and receive and take the rents and profits thereof for his and their own use and benefit, without any interruption or disturbance whatsoever by the said James Crofts, his executors or administrators, or by any person or persons claiming or to claim by, from, or under, or in trust for him or them; and that free from all former estates, rights, titles, interest, charges, and encumbrances whatsoever made, done,

or committed, or knowingly occasioned or suffered, by the said James Crofts, or any person or persons claiming by, through, or under him, except only the rent reserved by the said recited indenture of lease, and the covenants and agreements on the part of the lessee or assignee therein contained: And, moreover, that he the said James Crofts, his executors or administrators, and all and every persons and person whatsoever having or rightfully claiming under or in trust for him or them, shall and will at all times hereafter, at the request and expense of the said Thomas Elves, his executors, &c., do and execute all such acts, deeds, and assurances, for better and more absolutely assigning and assuring the said messuage and premises hereby assigned, with their *appurtenances, to the said Thomas Elves, his executors, &c., for [*245 all the then residue of the said term of twenty-one years, in manner aforesaid, or otherwise, as by the said Thomas Elves, his executors, &c., or his or their counsel or agent, shall be advised and required: And the said Thomas Elves doth hereby covenant, for himself, his heirs, executors, administrators, and assigns, that he or they shall and will, from time to time, and at all times hereafter during the residue of the said term of twenty-one years, well and truly pay the rent reserved by the said recited indenture of lease, and observe and perform all the covenants and agreements on the part of the lessee or assignee therein contained, and from and against the said rent, covenants, and agreements, and all actions, suits, costs, charges, damages, claims, and demands whatsoever, which shall or may thereafter arise or happen in respect thereof, shall and will at all times hereafter keep harmless and indemnified the said James Crofts, his heirs, executors, and administrators, and his and their estate and effects: And this indenture further witnesseth, that for the considerations aforesaid, he the said James Crofts doth hereby bargain, sell, and assign unto him, the said Thomas Elves, his executors, &c., all the several ranges, stoves, grates, cupboards, cisterns, coppers, dressers, shelves, and other tenants' fixtures, in and about the said messuage and premises hereinbefore assigned, or intended so to be, and all the chopping-blocks, scales, weights, butchers' trays, choppers, knives, and other articles and things used by the said James Crofts in his aforesaid business of a butcher, and also all the right, title, and interest of him the said James Crofts, to and in the same business, and the good-will and custom thereof,—to have and to hold the said fixtures and effects, and all other the premises lastly hereby bargained, sold, and assigned, or intended so to be, to *the [*246 said Thomas Elves, his executors, administrators, and assigns, as his and their own proper goods and chattels absolutely and for ever, free from all encumbrances affecting the same: And the said James Crofts, for the consideration aforesaid, doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said Thomas Elves, his executors, administrators, and assigns, that he, the

said James Crofts, shall not nor will, *at any time or times hereafter*, either by himself alone, or jointly with, or as agent, journeyman, or assistant for, any person or persons whatsoever, either directly or indirectly, or upon any account or pretence whatsoever, *set up, exercise, or carry on*, or be employed in carrying on, *the trade or business of a butcher, within five miles from the said messuage and premises hereby assigned*, or intended so to be; and shall not nor will, either by himself, or by or with any other person or persons, do, or cause to be done, any wilful act, matter, or thing to the prejudice of the trade or business of a butcher to be hereafter carried on by the said Thomas Elves, at or upon the said messuage and premises; but, on the contrary, shall and will endeavour to promote the interests of the said Thomas Elves, amongst the customers of the said James Crofts, and otherwise: And that, if the said James Crofts shall do any act in breach or violation of this present covenant, that he the said James Crofts shall and will immediately thereupon pay to the said Thomas Elves, his executors, administrators, or assigns, the sum of 300*l.*, to be deemed and considered, and the same is hereby declared to be as and for, liquidated and ascertained damages, and not in the nature of a penalty. In witness," &c.

The defendant then pleaded,—first, *non est factum*,—secondly, that he, the defendant, did not set up, exercise, or carry on such trade and *247] business, in breach *of the said covenant, in manner and form as in the declaration in that behalf alleged,—thirdly, that before the making of the said indenture, the said business carried on by the defendant as in the declaration mentioned, was that of a retail butcher; and that, after the making of the said indenture, and before the commencement of this suit, and for a long space of time, to wit, the space of one year before the defendant so set up, exercised, or carried on such business as in the declaration complained of, to wit, on the 20th of June, 1848, the plaintiff wholly discontinued the trade and business of a butcher at the said premises and ceased to carry on the same, and the same had not since been carried on at the said place, or elsewhere, by the plaintiff, or by any other person on his behalf, or by, through, or under any assignment of the said good-will or license in that behalf by the plaintiff made or given,—fourthly, that, after the making of the said indenture, and before the commencement of this suit, and long before the defendant so set up, exercised, or carried on such business as in the declaration complained of, to wit, on the 26th of June, 1846, the said term in the declaration mentioned, ended and expired by effluxion of time.

The plaintiff joined issue on the first two pleas, replied *de injuriâ* to the third, and traversed the fourth.

At the trial, before MAULE, J., at the last spring assizes at Kingston, a verdict was found for the plaintiff on the first and second issues,

damages 300*l.*; and for the defendant on the third and fourth issues,—with liberty to the defendant to move to enter the verdict for him on the second issue, if the court should be of opinion that his setting up the trade of a butcher within the prescribed limits after the covenantee had ceased to carry on the trade [and after the expiration of the term in the premises], was a breach of the covenant.

**Lush*, in the following term, obtained a rule nisi to enter up judgment for the plaintiff notwithstanding the verdict for the defendant on the third and fourth issues. He submitted that the covenant in question was valid, inasmuch as the restriction therein contained was not more extensive than the fair protection of the covenantee required; citing *Hitchcock v. Coker*, 6 Ad. & E. 438 (E. C. L. R. vol. 33), 1 N. & M. 796 (E. C. L. R. vol. 28), *Rannie v. Irvine*, 7 M. & G. 969 (E. C. L. R. vol. 49), 8 Scott, N. R. 674, and *Hastings v. Whitley*, 2 Exch. 611.† [WILLIAMS, J., referred to *Pemberton v. Vaughan*, 10 Q. B. 87 (E. C. L. R. vol. 59).] [*248]

Montagu Chambers, for the defendant, in pursuance of the leave reserved to him at the trial, also obtained a rule nisi to enter a verdict for the defendant on the second issue, upon the ground urged at the trial; or to arrest the judgment, on the ground that the covenant declared on was void in law, as an unreasonable restraint of trade.

Montagu Chambers and *Fortescue*, in the course of the same term, showed cause against the plaintiff's rule, and in support of the cross-rule.—The effect of the finding upon the third and fourth issues depends upon the construction which the court will put upon the deed: and this will be such a construction as will give full legal effect to it, though it somewhat restricts the letter of it, rather than such a one as will make it unlawful. It is laid down in *Sheppard's Touchstone*, Vol. I., pp. 85, 86, that the construction of a deed shall be as near the apparent intention of the parties as the words of the deed and the law will permit; and such that every part of the deed may take effect, and all the parts agree together. The grant here is of the residue of the term only; and the covenant must be construed with the implied qualification that it is to operate *so long only as the term continues and the covenantee, by himself or his assigns, carries on the trade therein,—otherwise, the party might purchase the business, and shut up the shop, out of mere caprice. [*249]

Prima facie, all contracts in restraint of trade are void: and it lies upon the party who seeks to enforce such a contract, to show that it is not unreasonable or oppressive, or contrary to public policy. From the earliest time, the covenantee has been required to show that the restraint imposed is not greater than is essential to his full and fair protection. A leading case upon this subject, is, *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith's Leading Cases, 171, in which PARKER, C. J., says: "Where a contract for restraint of trade appears to be made upon a

good and adequate consideration, so as to make it a proper and useful contract, it is good;" that is, *proper*, so far as the public are concerned, and *useful*, with reference to the interests of the party. In *Horner v. Greaves*, 7 Bingh. 735 (E. C. L. R. vol. 20), 5 M. & P. 768, an agreement that the defendant, a moderately skilful dentist, would abstain from practising his profession over a district *two hundred miles in diameter*, in consideration of receiving instructions and a salary from the plaintiff,—was held to be unreasonable and void. TINDAL, C. J., there says: "The law upon this subject has been laid down with so much authority and precision by PARKER, C. J., in giving the judgment of the Court of King's Bench in the case of *Mitchel v. Reynolds*,—which has been the leading case on the subject from that time to the present,—that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the court in that case, is, 'that voluntary restraints, by agreement between the parties, if they amount to a *general* restraint of trading by either party, are void, *250] whether with or without consideration; but *particular* restraints of *trading, if made upon a good and adequate consideration, so as to be a proper and useful contract,'—that is, so as it is a reasonable restraint only,—are good.'" "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public, is void, on the grounds of public policy." *Gale v. Reed*, 8 East, 80, is to the same effect. The same principle is adopted by PARKE, B., in *Ward v. Byrne*, 5 M. & W. 548.† There, the defendant gave a bond to the plaintiff, a coal merchant in London, by which, after reciting that the plaintiff, at the request of the defendant, had received and taken the defendant into his service in the capacity of town-traveller and collecting-clerk, it was conditioned, *inter alia*, that the defendant should not, within two years after leaving the plaintiff's service, solicit, or sell to, any customers of the plaintiff, that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the employ of the plaintiff, and that he should not leave his employ without giving a month's notice: and it was held, on motion in arrest of judgment, that the bond was void, on the ground that it was a restraint of trade *unlimited in point of space*. PARKE, B., there says: "Where a limit as to *space* is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade,—he will carry it on in the same way

*elsewhere; nor, within the limited space, will they be deprived of the benefit of the trade being carried on, because the party [251 with whom the contract is made will most probably within those limits exercise it himself. But, when a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and, looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a total restriction on trade, limited only as to time. The case cited from the Year Book, P. 2 H. 5, fo. 5, pl. 26, to which I before referred, and in which Mr. Justice HULL expressed himself so strongly, (a) was a case where the restriction was that the party should not carry on the business of a dyer for half a year; and he held that to be clearly and absolutely void. (b) There is, in short, no authority for the position, that any absolute restriction, limited only as to time, can be imposed, except the *dictum* of WILLES, C. J., in the case of *The Gunmaker's Company v. Fell*, Willes, 388: but his attention was *not called to any particular case of a [252 restriction in time only; and he probably used the general language referred to, with reference to those instances where the restriction was partial both as to time and space, which occurs in most of the cases. It seems to me, therefore, that there is no authority in favour of the position that there can be a general restriction limited only as to time, and that this case falls within the rule laid down by TINDAL, C. J. (c), viz. that this is a general prohibition from carrying on trade, which is more extensive than the interests of the party with whom the contract is made, can possibly require." In *Rannie v. Irvine*, 7 M. & G. 969 (E. C. L. R. vol. 49), 8 Scott, N. R. 674, the covenant was limited to the duration of the term assigned. In *Mallan v. May*, 11 M. & W. 653,† where a covenant was entered into by an assistant to a surgeon-dentist, not to practise in London, or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the defendant's service; it was held that the covenant not to practise in London was valid, the limit of London not being too large

(a) "Writ of debt was brought upon an obligation by one John Dier, where the defendant charges by Lod. (Lodington, King's Serjeant), (that) by a certain indenture which he produces, and upon condition, that, if the defendant do not exercise his art of dyer's craft within the town where the plaintiff, &c., for a certain term, to wit, half a year, the obligation shall lose its force; and says that he did not use his art of dyer's craft within the time limited; which matter he will verify; and we pray judgment if action, &c. HULL (justice of C. P.).—To my intent, you might have demurred upon him—that the obligation is void, so that the obligation is against common law; and, *par Dieu*, if the plaintiff were here, he should go to prison till he had made fine with the king. *Strange* (Serjt.).—We say that the defendant used his art for the time, to wit, seven days, within the time limited by the condition. And this he is ready to verify. And the others *2 contrd.*" And see Bro. Abr. *Faits*, pl. 93, *Obligation*, pl. 85.

(b) In that case, however, notwithstanding the intimation thrown out by Mr. Justice HULL, that the defendant might have demurred, an issue was taken upon whether the defendant had used his art within the time limited by the condition.

(c) In *Hitchcock v. Coker*, 6 Ad. & E. 438 (E. C. L. R. vol. 33), 1 N. & M. 796 (E. C. L. R. vol. 28).

for the profession in question; but that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service, was an unreasonable restriction, and therefore illegal and void. "Contracts for the partial restraint of trade," says PARKE, B., "are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and *253] have been *supported: such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry."

Lush and Joyce, contra.—There is no authority for saying that it is an implied condition in a covenant of this sort, that it shall chase to bind the covenantor when it is no longer useful to the covenantee. The covenant, being good at the time it was entered into, does not cease to be so, by any subsequent act of the parties. The third and fourth pleas are clearly bad, for introducing a qualification which is neither expressly nor by implication contained in the deed. The restraint imposed upon the defendant by the terms of this deed, is not more extensive than the reasonable protection of the plaintiff required, or than the law allows. In *Hitchcock v. Coker*, 6 Ad. & E. 438, 446 (E. C. L. R. vol. 33), 1 N. & M. 796 (E. C. L. R. vol. 28), a covenant was entered into by an assistant to a druggist, that, if he should at any time thereafter exercise the trade or business of a chemist and druggist in the town of Taunton, or within three miles thereof, he should pay 500*l.* as liquidated damages; and it was held, by the Exchequer Chamber,—reversing the judgment of the Court of Queen's Bench,—that the covenant was not unreasonable or oppressive, by reason of its not being limited to the life of the covenantee, or to the time during which he should carry on the business. TINDAL, C. J., in delivering the judgment of the Court of Exchequer Chamber in that case, says: "The ground upon which the court below has held this restraint of the defendant to be unreasonable, is, that it *254] operates more largely than the *benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it, must be therefore void. But the difficulty we feel is in the application of that principle to the case before us. Where the question

turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it; such as, the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or business is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But, with respect to *the duration* of the restriction, the case is different. The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed." So, in *Pemberton v. Vaughan*, 10 Q. B. 87 (E. C. L. R. vol. 59), an agreement to give up a house and good-will of a business for 7l., and not to open a shop in the same line *of business within one mile of the said house, under a forfeiture [255 of 20l., was held not to be illegal on the ground that the restraint of trade was unlimited *in point of time*, and might continue though the purchaser should cease to carry on the business. Lord DENMAN there said: "It does not follow that the plaintiff will not require the protection of the agreement, because he may not himself continue the business: he may sell it on better terms on account of the protection secured to it by such an agreement." In *Price v. Green*, 16 M. & W. 346,† the defendant covenanted that he would not "during his life carry on the business of a perfumer within the cities of London and Westminster, or within the distance of six hundred miles from the same respectively; and the covenant was held good so far as it related to the cities of London and Westminster, though void as to the six hundred miles. And in *Hastings v. Whitley*, 2 Exch. 611,† where the condition of a bond was, that, "if the obligor should practise as a surgeon or apothecary at Stourport, at any time, without the consent in writing of the obligee, then, if the obligor should pay the obligee 1000l., the bond should be void, otherwise it should remain in force,—it was held, that the period of restraint mentioned in the condition was not confined to the lifetime of the obligee. "The words, 'for any time,' " says PARKE, B., "*primâ facie* import that the period is not to be confined to the life of the obligee, but that it is co-extensive with that of the obligor; and it was held, in *Hitchcock v. Coker*, that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects a reasonable restriction." In *Davis v. Mason*, 5 T. R. 118, the agreement was, not to practise as a surgeon, for *fourteen years*, within *ten miles of the employer's place of abode; and this was held a valid agreement. [256 In *Hayward v. Young*, 2 Chitt. R. 407, a restriction from carrying on the

business of an apothecary within *twenty miles*, was held not to be unreasonable. And in *Proctor v. Sargent*, 2 M. & G. 20 (E. C. L. R. vol. 40), 2 Scott, N. R. 289, where the defendant, a servant to a cow-keeper, agreed that he would not, during the continuance of such service, or within the space of twenty-four months after quitting, or being discharged from, the same, commence, carry on, or be concerned, either as servant or master, in, the trade or business of a cow-keeper, milk-man, or milk-seller, within *five miles* from the place of his then employment,—was held valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade. [WILDE, C. J.—In *Whittaker v. Howe*, 3 Beavan, 883, an agreement by a solicitor, for valuable consideration, not to practise as solicitor, *in any part of Great Britain*, for *twenty years*, was held valid. I agree with Lord LANGDALE, who decided that case, that it is extremely difficult for the court to measure the precise boundary of what the protection of the party fairly requires. CRESSWELL, J.—If excess of *space* makes a contract of this sort unreasonable, why not of *time*, if the duration of the restraint be longer than is necessary for the protection of the party?] That remark seems to have been anticipated by PARKE, B., in *Ward v. Byrne*.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:

This was an action of covenant, in which the plaintiff declared on an indenture dated the 28th of October, 1842, whereby the defendant assigned to the plaintiff the residue of a term of twenty-one years in a
 *257] house *situate in Drury Lane, which expired in 1846, and the good-will and custom of the business of butcher which the defendant had conducted on the premises, in consideration of 200*l*. The covenant on which the breach was assigned was in the following terms:—“the defendant shall not nor will, at any time or times hereafter, either by himself alone, or jointly with, or as agent, journeyman, or assistant for, any person or persons whomsoever, either directly or indirectly, or upon any account or pretence whatsoever, set up, exercise, or carry on, or be employed in carrying on, the trade or business of a butcher, within five miles from the said messuage and premises hereby assigned, and shall not nor will, either by himself, or by or with any other person or persons, do or cause to be done any wilful act, matter, or thing to the prejudice of the trade or business of a butcher, to be thereafter carried on by the plaintiff at or upon the same messuage or premises, but, on the contrary, shall and will endeavour to promote the interest of the plaintiff among the customers of the defendant, and otherwise; and that, if the said defendant shall do any act in breach or violation of this present covenant, then he the said defendant shall and will immediately pay to the plaintiff, his executors, administrators, and assigns, the sum of 300*l*., to be deemed and considered, and the same is hereby

declared to be, as and for liquidated and ascertained damages, and not in the nature of a penalty."

The defendant craved oyer of the deed, and pleaded,—first, *non est factum*,—secondly, a denial of the breach that he had set up and carried on the business of a butcher contrary to the covenant, on which issue was joined;—thirdly, that the business carried on by the defendant before the assignment to the plaintiff, was that of a retail butcher; and that, after the making of the assignment, and long before the defendant set up *the business complained of in the declaration, the business of a butcher had ceased to be carried on at the said premises, [258 or elsewhere, either by the plaintiff, or by any one on his behalf, or under any assignment of the good-will, or any license from the plaintiff; to which plea the plaintiff replied *de injuriâ*; whereupon issue was joined;—fourthly, that, before breach, the term in the premises had determined by effluxion of time; which the plaintiff traversed, and upon which issue was joined.

At the trial, a verdict was found for the plaintiff on the first two issues, and for the defendant on the last two.

A rule was obtained by the plaintiff, for judgment notwithstanding the verdict for the defendant on the last two issues: and a cross rule was obtained by the defendant, pursuant to leave reserved, to enter a verdict for him on the second issue, on the ground that setting up the trade by him after that of the plaintiff had ceased, was not contrary to his covenant; or for arresting the judgment, on the ground that the covenant declared on was void in law.

These rules raise the questions,—first, whether, if the covenant declared on be taken without the implied qualification that it shall cease under the circumstances stated in the third plea, it is void in law,—and, secondly, whether a qualification may be implied which shall make that plea a good answer to the action. The validity of the fourth plea was not insisted on in argument; and, as we think there is no pretence for limiting the covenant to the term assigned to the plaintiff, that plea need not be considered further.

That a covenant expressed in the language of that declared on, is not void, as being in restraint of trade, or otherwise, is settled by the decision of *Hitchcock v. Coker*, 6 Ad. & E. 438 (E. C. L. R. vol. 33), 1 N. & P. 796, in the Exchequer Chamber, reversing the judgment [259 of the Court of Queen's Bench, in which all the previous authorities are reviewed, and the principle to be extracted from them, clearly defined. In that case, a contract by which, in consideration of becoming assistant to a chemist and druggist, the defendant engaged, that, if he should exercise those trades within the town of Taunton, or three miles thereof, he would pay the plaintiff 500*l.* as liquidated damages, was holden valid, although the possible event, which has happened in this case, was urged as showing that the restraint involved in the provision, was greater than

the protection which the plaintiff required, and that, if it were construed as limited to the life of the plaintiff, or to his carrying on trade by himself, his executors or assigns, the corresponding allegations were wanting. The court, therefore, held that a restriction reasonably limited as to space, but enduring for the life of the party restrained, was valid, as the only effectual mode of securing to the covenantee the full benefit of the good-will of his trade.

This case was followed by those of *Mallan v. May*, 11 M. & W. 658,† *Rannie v. Irwine*, 7 M. & G. 969 (E. C. L. R. vol. 49), 8 Scott, N. R. 674, *Pemberton v. Vaughan*, 10 Q. B. 87 (E. C. L. R. vol. 59), *Hastings v. Whitley*, 2 Exch. 611,† and *Atkyns v. Kinnier*, 19 Law Journ. Exch. 132, in which the principle there established, was recognised as beyond controversy. It is no longer, therefore, open to argument, that a restriction as large in its terms as is contained in the covenant in question, is invalid.

But it is suggested, that, as these decisions are based on the assumption that such a restriction is necessary for the entire protection of the covenantee, it must be construed as ceasing to operate in a case like that *260] asserted by the third plea, and found by the jury, where *the covenantee has ceased, by himself or his assigns, to carry on the business assigned. But we think this reasoning fallacious. If the covenant is binding to its full extent, when made, its signification cannot be varied by any subsequent occurrence: and, to hold otherwise, would be to render its import uncertain, and to impair its efficiency for that protection which the law contemplates as just.

Cases may be conceived, in which, notwithstanding the facts found by the jury,—that the covenantee had ceased, either on the premises or elsewhere, or by any assignee or licensee, to carry on the trade,—the good-will assigned might not be at once extinguished; and, if considerations of time or degree be permitted to affect the right to enforce such a covenant, its value would be diminished, and the saleable quality of good-will,—which, according to all the recent authorities, is deserving protection,—would be affected.

As we think, in this case, the defendant's covenant not to carry on trade within the prescribed distance, is not qualified by the subsequent general covenant to abstain from any wilful act to the prejudice of the plaintiff's business, we are obliged to hold that the declaration discloses a good cause of action, to which the third and fourth pleas contain no answer; and that the breach is a contravention of the covenant, notwithstanding the facts found by the jury.

The result, therefore, is, that the plaintiff's rule for judgment *non obstante veredicto* must be made absolute, and the defendant's rule for entering a verdict for him on the second issue, or for arresting the judgment, must be discharged.

Plaintiff's rule absolute.

Defendant's rule discharged.

7 Cowen, 307; Ross v. Sadgbeer, 21 Wend. 166; Alger v. Thacher, 19 Pick. 51.

But a covenant not to trade in a particular place and for a particular time is good. Noble v. Bates, 7 Cowen, 307; Pierce v. Fuller, 8

Mass. 223; Perkins v. Lyman, 9 Mass. 522; Stearns v. Barrett, 1 Pick. 443; Palmer v. Stebbins, 3 Ibid. 188; Pierce v. Woodward, 6 Ibid. 206; Pyke v. Thomas, 4 Bibb, 486; Chappel v. Brockway, 21 Wend. 157.

*BARTON v. DAWES.

[*261

A deed purported to convey "all that messuage or farm-house, &c., and several closes, &c., of land thereto belonging, called Gotton Farm, in the occupation of J. S., and containing, &c., and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated in a map or plan thereof drawn in the margin of the said schedule." There were no general words.

In an action brought to try the right to a slip of land, which was not mentioned either in the schedule or in the plan above referred to, evidence was offered on the part of the defendant to show that the *locus in quo* had always been occupied with the closes mentioned and delineated in the schedule and plan, and treated as part of Gotton Farm:—Held, that this evidence was not admissible, and that the deed was conclusive.

THIS was an action of trespass brought to try the right to a slip of land in Hampshire, claimed by the plaintiff as belonging to a farm called Chale Farm, of which he was tenant under Sir Willoughby Gordon. Pleas, not guilty, not possessed, and *liberum tenementum*.

The defendant was the owner and occupier of a farm called Gotton Farm. The cause was tried before ERLE, J., at the last Spring assizes at Winchester. The slip in question was a portion of a down belonging to a third person. A witness named Sewell, who was called on behalf of the plaintiff, proved that several years ago he met a person on the part of Sir Willoughby Gordon for the purpose of ascertaining the boundary, and that, upon that occasion, the bound-stones were placed by them, the removal of which by the defendant was the trespass complained of. The plaintiff also put in the deed by which Gotton Farm was conveyed to the defendant: this deed purported to convey "all that messuage or farm-house, with the barns, sheds, &c., and several closes, pieces, or parcels of land thereto belonging, called Gotton Farm, in the occupation of David Brown, and containing altogether 209 acres, 2 roods, 28 perches, and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated and set forth in the map or plan thereof drawn in the margin of the said schedule."

*On the part of the defendant, it was submitted that there was no evidence of possession in the plaintiff, to entitle him to maintain trespass: and it was proposed to call witnesses to prove that the slip of land in question had always been occupied with the closes mentioned in the schedule annexed to the conveyance, and treated as part of Gotton Farm. [*262

The learned judge, however, was of opinion that the plaintiff had proved a sufficient possession as against a wrongdoer: and he ruled that

46 Wms 436: 24 C.P. P 23411

the deed was conclusive against the defendant, and declined to receive evidence to contradict it.

A verdict having been found for the plaintiff, with nominal damages, *Crowder*, in Easter term last, moved for a rule nisi for a new trial, on the ground of misdirection. The deed, with the schedule and plan therein referred to, was no doubt strong evidence against the defendant: but not conclusive. The only evidence of possession in the plaintiff, was, the act of setting out the bound-stones. [CRESSWELL, J.—With the sanction of the owners of the land on both sides.] What was intended to pass by the deed, was clearly a question for the jury. The evidence ought not to have been rejected. This is somewhat analogous to the case of *Carpenter v. Buller*, 8 M. & W. 209,† in which it was held, that, where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital: but that a party to an instrument is not estopped, in *263] an action by another party, not founded on the deed, and wholly *collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made, is receivable to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish. [WILLIAMS, J.—The learned judge seems to have proceeded upon the ground that the map was the governing thing, the rest being mere *falsa demonstratio*. He probably had in his mind the case of *Llewellyn v. The Earl of Jersey*, 11 M. & W. 183.† In that case, a deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed “No. on the plan of the Brixton Ferry Estate,” as “153 b;” in a second column headed “Description of premises,” as “a small piece marked on the plan;” in a third column, as being in the occupation of J. E.; and, in a fourth, as “34 perches.” At the time of the contract, a line was drawn upon the plan, as the boundary line dividing the piece 153 b from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found to be incorrect, 153 b containing, within the line so drawn, less than 34 perches, according to the actual measurement of the land. It was held, that the statement that the piece of land conveyed contained 34 perches, was merely *falsa demonstratio*, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. PARKE, B., says: “It appears to me that this case may be determined by the application of two well-known maxims of law. The first is, that, ‘*verba illata inesse videntur*,’ according to which, we must consider it to be the same thing here, as if the map or plan, which is there referred to,

had been actually inserted in the *deed. But the words '34 perches,' having no relation to the plan, must be taken to mean [*264 34 perches by admeasurement. Then, the other rule of law applies, that as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it; according to the maxim '*falsa demonstratio non nocet.*'"]

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:—

This action was brought to try the right to a slip of land which the plaintiff claimed as part of Chale Farm, and which the defendant contended had been conveyed to him as part of Gotton Farm.

At the trial before ERLE, J., at the Spring assizes for Hampshire, it was proved, that, before the conveyance of Gotton Farm to the defendant, the boundary between Gotton Farm and Chale Farm had been adjusted by arrangement, and bound-stones had been set up pursuant to it, which excluded the close in question from Gotton Farm. The deed of conveyance under which the defendant claimed, purported to convey "all that messuage or farm-house, with the barns, sheds, &c., and several closes, pieces, or parcels of land thereto belonging, called Gotton Farm, in the occupation of David Brown, and containing altogether two hundred and nine acres, two roods, and twenty-eight perches, and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated and set forth in the map or plan thereof drawn in the margin of the said schedule." This description was not followed by any general words; and neither the schedule nor the plan contained the close in question.

It was proposed, on the behalf of the defendant, to *give evidence to show that the *locus in quo* had always been occupied [*265 with the closes mentioned in the schedule, and treated as part of Gotton Farm; and it was insisted that it was intended by the deed to convey all which was known as Gotton Farm, and that the omission of the close in question in the schedule and map must have been merely a mistake. The learned judge ruled that the deed was conclusive against the defendant, and directed a verdict for the plaintiff.

We are of opinion that the learned judge was correct in his ruling.

The deed professes to convey the several enumerated closes of land belonging to a messuage called Gotton Farm; but it proceeds to state that Gotton Farm consisted of the closes named in the schedule and delineated in the plan; and there is no doubt that the closes named and delineated were called Gotton Farm, and therefore satisfied that general description: but, of whatever else Gotton Farm might have consisted, the closes named and delineated were alone intended to pass. The deed itself is unambiguous, and distinct; and no latent ambiguity is raised by the proposed proof. It may be observed, that if the facts proved, and proposed to be proved, could be taken into consideration, in con-

struing the deed,—which cannot properly be done,—the tendency of those facts is rather to confirm than otherwise the construction of the deed itself, and to manifest that the close was not intended to pass; because, if the fact be as stated, that the placing of the bound-stones, the enumeration of the closes, and the plan so drawn, all excluded the close in question, in consequence of a mistaken opinion entertained at the time, that the close was part of Chale Farm, of course the grantor of Gotton Farm did not intend to convey that which he supposed did not belong to him; and the subsequent discovery of the mistake will not make that pass by the deed, which is neither within the terms of the *266] grant, *nor was intended to pass. The point is not, therefore, really open to any doubt.

The case of *Llewellyn v. The Earl of Jersey* was very analogous to the present. In that case, the conveyance was of land delineated in a plan, not drawn in the deed, but referred to by the deed as the land intended to be conveyed, but which did not comprise the disputed land. The parties had, previously to the conveyance, drawn a line upon the plan, to mark the boundary of the property conveyed, and had, upon the face of the plan, specified the quantity supposed to be contained within the boundary. It was afterwards found that the quantity mentioned was not contained within the boundary line, and evidence was offered of circumstances tending to show that the boundary line had been marked by mistake, and that it was intended to convey the quantity of land mentioned in the plan. In that case, therefore, there was an inconsistency in the terms of the conveyance, the court considering that the reference to the plan had the same effect as if the plan had been drawn upon the face of the deed, and the position of the boundary line, and the description of the quantity of the land contained within it, did not correspond. The court held, that the conveyance, being, in terms, of the land comprised within the boundary line, was conclusive as to what was conveyed, and that the statement of the quantity being larger than the quantity contained within the line, and the other circumstances, could not be admitted to vary the construction of the deed; but that such statement of quantity, in addition to the clear conveyance of the land within the boundary line, fell within the maxim "*Falsa demonstratio non nocet.*" The principle of construction adopted in that case, is strictly applicable to the present, and sustains the learned judge's ruling. The motion for a new trial, therefore, fails. Rule refused.

***WETHERELL v. JULIUS and Another.** *June 25.* [*267

A., being sued by B., retained C., an attorney, to defend him. By C.'s negligence, a judgment was obtained against A., upon which he (being then in custody) was charged in execution for a large sum, and was put to expense, in endeavouring to procure his release, and to reverse the judgment, by writ of error:—Held, that this was not a cause of action which passed to A.'s assignees, upon his insolvency.

A., a beneficed clergyman, brought case against his attorneys, for having, through their negligence and want of skill, permitted a writ of *sequestrari facias* to remain in force against him longer than was necessary, whereby A., during that time, lost the rent, tithes, and profit of his living:—Held, that this was a cause of action which passed to A.'s assignees, upon his insolvency.

THIS was an action upon the case for alleged negligence on the part of the defendants, as attorneys for the plaintiff in certain matters in which they had been retained for him.

The first count of the declaration alleged that an action of covenant had been commenced by one Thomas Langston against the now plaintiff; that he retained the defendants to defend him in that action, that they carelessly, &c., neglected to cause a demurrer in that suit to be argued; that, in consequence thereof, judgment was given against him, which would not otherwise have been the case, and that judgment was given against him for a large sum of money, to wit, 14,400*l.* 18*s.* 10*d.* damages, and 75*l.* 6*s.* 6*d.* costs; that the now plaintiff was afterwards brought up on a writ of *habeas corpus ad satisfaciendum*, before the barons of the Exchequer, and remanded in custody to the Queen's Prison, charged in execution for the damages and costs of Langston in respect of that action; that the plaintiff was thereby detained in custody of the keeper of the said prison, from thence, &c., and was forced and obliged to expend a large sum of money, to wit, &c., in endeavouring to defend himself against the said judgment, and in endeavouring to procure his release from custody; and that he the plaintiff was also put to divers costs, &c., in bringing a writ of error in Her Majesty's Court *of Exchequer Chamber, for the purpose of reversing the said judgment. [*268

The second count alleged, that the plaintiff was rector of Byfield, in the county of Northampton, and that one Frederick Nesbitt caused and procured a certain writ of *sequestrari facias* to be issued out of the Court of Queen's Bench, founded on a judgment entered up under colour and pretence of a certain warrant of attorney executed by the plaintiff, whereby the Bishop of Peterborough was commanded to levy, from the rents, tithes, oblations, obventions, fruits, issues, and profits of the said rectory, and other ecclesiastical goods of the plaintiff in his diocese, a certain sum of 1500*l.*, and interest at 4*l.* per cent. per annum from the 28th of July, 1843, and all expenses of sequestration and levy: that the plaintiff, at the special instance and request of the defendants, employed and retained them as his attorneys, for certain fees and rewards.

to be therefore paid by the plaintiff to the defendants in that behalf, to counsel and advise the plaintiff in and about the setting aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, and to use due endeavours to set aside the same: that the defendants then accepted the said employment and retainer, and that thereupon it then became and was the duty of the defendants, as such attorneys, so employed and retained as aforesaid, well, faithfully, carefully, diligently, and skilfully to act as the attorneys of the plaintiff in and about the counselling and advising the plaintiff of and concerning the said warrant of attorney, judgment, and writ of *sequestrari facias*, and to use due endeavours to set aside the said warrant of attorney, judgment, and writ of *sequestrari facias*: and that, although a reasonable time for endeavouring to set aside the said warrant of attorney, judgment, and writ, had elapsed before the commencement of this *suit, yet that the defendants, *269] well knowing the premises, but neglecting and disregarding their duty, and their said employment and retainer in that behalf, and contriving and intending to injure and aggrieve the plaintiff, did not well, faithfully, carefully, diligently, and skilfully counsel and advise the plaintiff of and concerning the said warrant of attorney, judgment, and writ of *sequestrari facias*, or use due endeavours, or proper or any endeavours, to set aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, but, on the contrary thereof, wholly neglected so to do, and conducted themselves so carelessly and negligently and unskilfully in and about the counselling and advising as aforesaid, and the endeavouring to set aside the warrant of attorney, judgment, and writ of *sequestrari facias*, and in discharge of their duties as attorneys of and for the plaintiff, that, by reason of such negligence, carelessness, improper conduct, and want of skill of the defendants, and by and through the neglect and default of the defendants, the said writ of *sequestrari facias* remained in force for a much longer time than it otherwise would have remained in force, to wit, for two years; and that the said bishop during that time executed the said writ of *sequestrari facias*, and sequestered all and singular the rents, tithes, oblations, obventions, fruits, issues, profits, and all other ecclesiastical rights and emoluments of and belonging to the said rectory, and of which the said plaintiff was and is the rector as aforesaid, which he otherwise would not have done; and that thereby, and by reason thereof, the plaintiff became and was, and still is, deprived of all and singular the rents, tithes, oblations, obventions, fruits, issues, and profits, and all other ecclesiastical rights and emoluments of and belonging to, and arising and accruing *from, the *270] said rectory,—to the damage of the plaintiff, &c.

The defendants pleaded, to the first count,—that, after the making and passing of the 1 & 2 Vict. c. 110, and before the committing by the defendants of the grievances in the said first count mentioned, to wit, on the 20th of March, 1845, the now plaintiff was committed by Sir R.

M. ROLFE, Knt., one of the barons of the Court of Exchequer, to the Queen's Prison, to be there detained under and by virtue of the said writ of *capias ad satisfaciendum*, to satisfy one A. B. a certain debt of 21*l.* 18*s.* 6*d.* and 7*l.* 5*s.* costs, and which said writ thenceforth continually until and at the committing of the grievances in the said first count mentioned, and until and at the time of the commencement of this suit, continued and was in full force, and the now plaintiff was, from the time of his being so committed, continually until and at the time of the commencement of this suit, kept and detained in the said prison under and by virtue of the said writ: that, after the plaintiff had been so committed as such prisoner as aforesaid, and whilst he was such prisoner as aforesaid, and before the committing by the defendants of the grievances in the said first count mentioned, to wit, on the 30th of April, 1845, the plaintiff was, under and by virtue of a certain writ of *habeas corpus ad satisfaciendum*, brought before the Court of Exchequer, and was by that court remanded to, and charged in execution, in the said prison, at the suit of one William Thurmott, for a certain debt of 48*l.* theretofore recovered by the said William Thurmott against the now plaintiff, and also for the sum of 11*l.* 12*s.* 8*d.* for damages, costs, and charges, and interest; under and by virtue of which said charging in execution the now plaintiff was kept and detained in the said prison thenceforth continually until and at *the time of the commence- [*271
ment of this suit; that the now plaintiff did not within twenty days next after he had been so charged in execution at the suit of the said William Thurmott as aforesaid, or at any time after he the said plaintiff had been so charged in execution as aforesaid, and before the making of the order thereafter mentioned, make satisfaction to the said William Thurmott for the said debt, damages, costs, and charges, or any or either of them, or any part thereof: that thereupon afterwards, and after the expiration of the said twenty-one days, and after the committing by them the said defendants of the grievances in the declaration mentioned, and before the commencement of this suit, to wit, on the 16th of March, 1846, the said William Thurmott, so then being such creditor of the plaintiff as aforesaid, did, according to the directions and provisions of the said act of parliament, apply by petition to the court for the relief of insolvent debtors, for a vesting order; that such order was accordingly made; and that, by virtue of such order, and of the said act of parliament, the causes of action in the declaration mentioned, and each and every of them, became thenceforth, and hitherto had been, and then were, vested in the provisional assignee,—verification.

There was a similar plea to the second count.

To each plea there was a general demurrer, and joinder.

Peacock (with whom was Paterson), in support of the demurrer,—The question which arises upon the demurrer to the plea to the first

count, is, whether an action will lie at the suit of an insolvent debtor against an attorney, by whose negligence he has suffered damage by the loss of his personal liberty, and incurred expense in procuring his release,—and whether such a cause of *action passes to his assignees. To sustain the plea to the first count, the defendants must show that the whole of the cause of action alleged in that count passed to the assignees, as in *Rogers v. Spence*, 12 Clarke & Fin. 700. If the plaintiff's goods had been taken under the judgment, the case might have been different; though, even then, it is by no means clear that the plaintiff might not have sued in respect of the *personal* injury to himself from the loss of them. In *Brewer v. Dew*, 11 M. & W. 625,† it was held that an action of trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of a debt, *per quod* the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house, did not pass to the plaintiff's assignees, upon his bankruptcy. Lord ABINGER there says: "The substantial ground on which this case is to be decided, is this,—whether, on this declaration, as it stands, the jury could give vindictive damages, for the seizing and taking of the goods, beyond their value. For the breaking and entering, it is admitted they might give damages beyond the amount of the actual injury. Now, I think, that, under this declaration, the plaintiff might give evidence to show that the entering, and the seizure of the goods, were made under a false and unfounded pretence of a legal claim, and that thereby the plaintiff was greatly annoyed and disturbed in carrying on his business, and was believed to be insolvent, and that, in consequence, his lodgers left him. Might not the jury, then, give vindictive damages for such an injury, beyond the mere value of the goods?" And ROLFE, B., said: "I quite agree as to the propriety of the test applied to this case by my lord; and I not only think that vindictive damages might be given here, but also *that there is special damage, properly alleged in this declaration, for which the assignees could not have maintained an action." If, in this case, the assignees could maintain an action for the personal inconvenience sustained by the insolvent, upon what principle would the damages be assessed? In *Beckham v. Drake*, 13 Jurist, 921, 2 House of Lords Cases, 579, it was held by the House of Lords, that the assignees of a bankrupt might sue for the breach of an agreement to employ him for a term of years: but there was no personal suffering, no injury to the feelings, in that case, there. CRESSWELL, J., in giving his opinion in that case, referring to *Marzetti v. Williams*, 1 B. & Ad. 415 (E. C. L. R. vol. 20), says: (a) "I apprehend the right of action in that case would have vested in the assignees, had a bankruptcy accrued." But Lord BROUGHAM intimates a doubt of the accuracy of that opinion. "In that case," he says, (b) "Marzetti had a right, no doubt, to obtain

(a) 2 House of Lords Cases, 611.

(b) Ib. 641.

damages, though they might be only nominal, for such injury personally to himself, from the defendants, the bankers, who had refused payment of the check. But I do not, nor need I, to support this judgment, go so far as to say that that particular right would have passed, as one of the learned judges says in this case, to the assignees under the commission." It is clear, therefore, that a right to recover damages for mere personal suffering or inconvenience, will not pass to the assignees.

The plea to the second count also is bad, inasmuch as the cause of action disclosed by that count, is not one which would pass to the assignees. The 1 & 2 Vict. c. 110, s. 55, enacts, "that nothing in that act contained, shall extend to entitle the assignee or assignees of the estate and effects of any prisoner, being a beneficial clergyman, or curate, to the income of such *benefice or curacy for the pur- [*274 poses of this act: provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner; and the order appointing an assignee or assignees of such prisoner in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such prisoner.(a) If the sequestration had not issued, the insolvent would have received the whole profit of the living. [WILDE, C. J.—He would have been obliged to give up to his assignees what remained in his hands at the time of the vesting order.]

Hugh Hill, *contra*.—The cause of action stated in the first count of this declaration, clearly does not fall within any of the exceptions mentioned by WILDE, C. J., in *Beckham v. Drake*. "The cases," says his lordship,(b) "of exception to the rights of action passing to assignees, seem to me to be very distinguishable from the present case. The right of action for a trespass does not pass, because trespass can only be maintained by the party whose actual possession is intruded upon: but I apprehend, that, if the trespasser has done actual damage to the personal estate of the bankrupt, as well as committed a trespass upon his possession, there is no authority which decides that assignees may not maintain an action in respect of the diminution in value or injury to the chattels that have passed to them under the bankruptcy. This is a case of contract; and the cases in which it has been held that the right of action for *a breach of contract before the bankruptcy, did not pass to the assignees, were cases where the gist of the action was not the [*275 pecuniary damage, but the injury to the feelings; and, in those cases, although pecuniary damage may have been incidental or accessary, it was not the principal injury, and the right to recover the incidental da-

(a) See *Smith v. Wetherell*, 17 Law Journ., N. S., Q. B. 57.

(b) 2 House of Lords Cases, 634.

mages was not severable from the principal. Such cases are clearly distinguishable from a case in which the pecuniary damage, and not the injury to the feelings, is the cause of action. A third class refers also to injuries or wrongs strictly personal to the bankrupt, such as, injuries to his person or character. In such cases, it is true, pecuniary compensation is sought to be recovered; but the pecuniary injury is not the measure of the damages recoverable: and such cases also seem to me to be essentially distinguished from actions for breaches of contract, in which the pecuniary injury is not only the gravamen of the action, but also the measure of the damage which the party is entitled to recover." And, in conclusion, the learned judge said: "I have only further to observe, that no injury is done to the bankrupt by holding such a plea as is pleaded to this action to be good; because, it is clear, that, if he were allowed to incur the expenses of prosecuting the action to judgment, the assignees would have a right to interpose, and take the fruits of such judgment." CRESSWELL, J., after referring to *Smith v. Coffin*, 2 H. Blac. 444, 462, *Ford and Sheldon's case*, 12 Co. Rep. 1, *Ryall v. Rolle*, 1 Atk. 165, 183, *Wright v. Fairfield*, 2 B. & Ad. 727 (E. C. L. R. vol. 22), *Porter v. Vorley*, 9 Bing. 93 (E. C. L. R. vol. 23), 2 M. & Scott, 141 (E. C. L. R. vol. 28), and *Marzetti v. Williams*, 1 B. & Ad. 415 (E. C. L. R. vol. 20),—says: (a) "It seems to me, that, according to the *276] construction which has been put upon the *bankrupt acts, from the 34 & 35 H. 8 to the present time, rights of action vested in the bankrupt before his bankruptcy, pass to his assignees, either as goods, or as part of his personal estate." And WILLIAMS, J., says: (b) "Assuming the general rule to be, that a right of action in respect of a breach of contract already incurred at the time of the bankruptcy, forms part of the personal estate of the bankrupt, and so passes to his assignees, it has been argued, on behalf of the appellant, that the present case must be regarded as an exception to that rule, inasmuch as the damages recoverable in respect of this breach of contract, must be, in part, compounded of the personal inconvenience to the bankrupt himself caused by such breach, and that the case must therefore be governed by the principle which excludes both the executors and assignees from suing in respect of breaches of contract, where the damage consists of personal suffering. It certainly has been established by a series of authorities, ending with the case of *Rogers v. Spence*, in this House, (c) that no action can be maintained, either by an executor or by an assignee, to recover damages for bodily or mental sufferings, or personal inconvenience, sustained by the deceased, or by the bankrupt; the foundation of which is, perhaps, that it would in many cases be attended with extremely harsh and unjust consequences, if the discretion as to whether a redress for wrongs of this nature should be sought, was to be intrusted to any one

(a) 2 House of Lords Cases, 611.

(b) 2 House of Lords Cases, 597.

(c) 12 Clark. & Fin. 700.

but the very person who has received the injury. But it does not appear to me that any damage would be recoverable in this action, in respect of any *personal inconvenience* sustained by the bankrupt." These observations completely and satisfactorily dispose of the cases of *Brewer v. Dew* *and *Rogers v. Spence*. The substantial damage here, is to the personal *estate* of the insolvent; and the mere fact that a [*277 detainer was lodged against him, does not show that he had, or could have, sustained any *personal inconvenience* from the alleged negligence of the defendants. If Langston's execution had been the only one, it could not, of course, have been contended that the plaintiff would not have had a right of action for the personal inconvenience thereby occasioned to him.

The cause of action in the second count, is not a personal injury or inconvenience, but an actual pecuniary loss, viz., of the profits of the plaintiff's benefice, which, according to the principles laid down in *Beckham v. Drake*, clearly passed to the assignees.

Peacock, in reply.—Being charged in execution for so large a sum as 14,408*l.* 18*s.* 10*d.*, was a personal damage and inconvenience to the plaintiff, for which he was clearly entitled to maintain an action, irrespectively of any claim by his assignees for any injury accruing to his estate. [WILDE, C. J.—What personal inconvenience could arise to him from a mere entry in the marshal's book? Formerly, the entry might have rendered it difficult for the party to obtain the rules: but that inconvenience does not exist now.] It would operate an injury to his credit, for which, according to the principles laid down in the case of *The Dippers of Tunbridge Wells*, (a) *Godefroy v. Jay*, 7 Bingh. 413 (E. C. L. R. vol. 20), 5 M. & P. 284, and *Marzetti v. Williams*, 1 B. & Ad. 415 (E. C. L. R. vol. 20), the plaintiff is, at all events, entitled to nominal damages. [WILDE, C. J.—That is coming back to the breach of duty.] It is submitted that the right of action in respect of personal *suffer- [*278 ing arising from a breach of duty, remains in the insolvent. As to the second count,—it does not appear from the record that the assignees have obtained a sequestration; and, until they have done so, they could acquire no right to the benefice, or to the income arising from it: *Bishop v. Hatch*, 1 Ad. & E. 171 (E. C. L. R. vol. 28).

Cur. adv. vult.

TALFOURD, J., now delivered the judgment of the court.

The declaration in this case contained two counts, imputing negligence to the defendants as attorneys for the plaintiff in certain matters in which they had been retained by him.

The first count alleged, that an action of covenant had been commenced by one Thomas Langston against the now plaintiff, and that he retained the defendants to defend him in that action; that they carelessly neglected to cause a demurrer joined in that suit, to be argued on

behalf of the now plaintiff, in consequence whereof judgment was given against him, which otherwise would not have been the case; and that judgment was given against him for a large sum of money, to wit, 14,408*l.* 18*s.* 10*d.*, and 75*l.* 6*s.* 6*d.* costs; and that he was afterwards taken, by *habeas corpus*, before the barons of the Exchequer, and remanded to the custody of the keeper of the Queen's Prison, in execution for the said sums; and that he was thereby, and by virtue thereof, kept in prison thence to the time of pleading, and put to great expense in bringing a writ of error to reverse the judgment.

The second count alleged that the plaintiff was rector of Byfield, in the county of Northampton; and that one Frederick Nesbitt procured *279] a writ of **sequestrari facias* to be issued, founded on a judgment entered up under colour and pretence of a certain warrant of attorney executed by the now plaintiff in favour of the said Frederick Nesbitt, whereby the Bishop of Peterborough was commanded to levy, &c., and the now plaintiff employed and retained the defendants to counsel and advise him in and about the setting aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, and to use due endeavours to set aside the same; that they did not use any endeavours to do so, and conducted themselves so carelessly in the matter, that, by reason thereof, the writ of *sequestrari facias* remained in force much longer than it otherwise would, to wit, for two years, and the bishop, during that time, executed the writ, and sequestered all and singular the rents, tithes, oblations, obventions, fruits, issues, and profits, and all other ecclesiastical rights and emoluments of and belonging to the said rectory, which he otherwise would not have done, and by reason whereof the plaintiff became and was, and continued to be, deprived of all and singular the rents, tithes, &c.

The defendants pleaded, to the first count, that, after the passing of the 1 & 2 Vict. c. 110, and before the committing of the grievances in that count mentioned, the now plaintiff was committed to the Queen's Prison as a prisoner, under a *ca. sa.*, and was under that commitment kept and detained in the said prison thenceforth until and at the time of the commencement of this action; that, afterwards, and before, &c., he was brought by *habeas corpus* before the Court of Queen's Bench, and by that court charged in execution at the suit of one William Thermott, for a debt of 48*l.*, and 11*l.* costs, and under that execution kept and detained in the said prison until and at the commencement of this *280] suit; and the plea then went on to aver, that the now *plaintiff did not, within twenty-one days after he had been so charged in execution, make satisfaction; and that Thermott, after the committing of the grievances in the first count of the declaration mentioned, petitioned the insolvent debtors' court, and obtained a vesting order, and that, by virtue of the said order, and of the said act of parliament, the causes of action in the first count of the declaration mentioned, became,

and thenceforth continually had been, and still was, vested in Samuel Sturges, as provisional assignee of the insolvent debtors' court.

There was a similar plea to the second count, a general demurrer to each plea, and joinder.

The question raised, on arguing the demurrer, was, whether the causes of action in the first and second counts respectively mentioned, passed to the assignee of the insolvent debtors' court.

This subject has recently been fully discussed and considered in two cases,—*Rogers v. Spence* and *Beckham v. Drake*—both of which were carried by writ of error to the House of Lords: the former is reported in 12 Clark & Fennelly, 700, and the latter in 2 House of Lords Cases, 579: and we think it unnecessary to enter at present into any further discussion of the principles on which the question is to be decided; and that the only thing required, is, to apply the rule given in those cases to the present.

In the former, it was held, that a cause of action arising out of a wrong personal to the insolvent, and for which he would be entitled to a remedy, whether his property were diminished or impaired or not, does not pass to the assignee. Now, in the first count of this declaration, it is said, that, in consequence of the negligence of the defendants, a judgment was obtained against the plaintiff, and that, under it, he was brought into the Court of Exchequer by virtue of a writ of **habeas corpus ad satisfaciendum*, and was remanded to the Queen's Prison, [*281 charged with the amount for which that judgment was obtained. This certainly is a personal wrong, for which he would be entitled to a remedy, wholly irrespectively of any pecuniary loss sustained: and, accordingly, we hold that it would not pass to the assignee, and that the plea to the first count is bad.

On the other hand, in *Beckham v. Drake*, it was held, that, where pecuniary loss or damage is the substantial and primary cause of action, it does pass to the assignee, although such pecuniary loss may produce inconvenience to the party. Now, the second count of this declaration does not aver that the now plaintiff sustained, by reason of the negligence therein imputed to the defendants, any other damage than the loss of the tithes, &c., which were sequestrated; and that cause of action, according to the last-mentioned case, *did* pass to the assignee; and the plea to this count is therefore good, and judgment upon it must be for the defendants.

Judgment for the plaintiff, on the demurrer to the plea to the first count.

Judgment for the defendant, on the demurrer to the plea to the second count.

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*BATTY v. MELILLO. *June 24.*

The declaration stated, that, on the 7th of July, 1848, it was agreed between the plaintiff and the defendant, that the defendant and his wife should, from that day, for the term of three months, appear and perform *as equestrians, on the stage and in the ring*, in all performances and entertainments which might be produced at Astley's Amphitheatre, or *elsewhere*, under the direction of the plaintiff, in such parts and in such manner as the plaintiff should require, and should attend all rehearsals and calls, when so required, for a certain weekly salary. It then, after averring mutual promises, alleged for breach, that, although the plaintiff had an establishment at Peebles, in Scotland, under his direction, *for equestrian performances and entertainments*, and although, under and in pursuance of the agreement, and during the subsistence of it, and before the expiration of the term of three months, to wit, on, &c., the plaintiff gave notice to the defendant that he the plaintiff required the defendant and his wife to join the plaintiff's said establishment at Peebles, for the purpose of appearing and assisting in the performances and entertainments to be produced at the said establishment at Peebles, and although a reasonable time had elapsed, after the giving of the notice, and before the commencement of the suit, for the defendant and his wife to join the said establishment at Peebles, for the purpose aforesaid,—yet that the defendant and his wife would not, when so required as aforesaid, or at any time afterwards, join the said establishment of the plaintiff at Peebles, or appear or assist in the performances and entertainments to be produced there, but refused and neglected so to do, &c.

Held, on demurrer, that the promise to appear in any place, under the direction of the plaintiff, in the performances described, in such parts and manner as the plaintiff should require, and to attend all calls and rehearsals, involved an engagement so to join an establishment of the plaintiff for equestrian performances, as to be ready to accomplish the objects of the requisition; and that a failure to comply with such a requisition, and a refusal to assist in such performances, were sufficiently alleged to show a breach of the defendant's contract:

Held also, that it sufficiently appeared that the performances at which the defendant and his wife were required to assist, were performances of the description contracted for; that the absence of an averment that a reasonable time had elapsed after the notice, and before the expiration of the three months, was obviated by the statement in the declaration that the writ issued on the 23d of August, 1848, and by the averment that such time had elapsed before the commencement of the suit; and that the breach, substantially showing an entire refusal of the defendant to perform his contract, disclosed a good cause of action.

THIS was an action of assumpsit. The writ was issued on the 23d of August, 1848.

The declaration stated, that, heretofore, to wit, on the 17th of July,

*283] 1848, by a certain agreement then *made between the plaintiff of the one part, and the defendant of the other part, it was agreed by and between the plaintiff and the defendant, that the defendant and one Caroline Melillo, his wife, should, from the said 17th of July, 1848, for the term of three months, appear, perform, and assist, to the best of their ability, as equestrians, on the stage and in the ring, in all performances and entertainments which might be produced, at Astley's Amphitheatre, or *elsewhere*, under the direction of the plaintiff, in such parts, and in such manner, as the plaintiff, or his deputy should require, and should attend all rehearsals and calls, when so required, and should in all things conform and be subject to the printed rules and regulations of the theatrical establishment of the plaintiff,—the plaintiff furnishing two horses for the plaintiff and Caroline Melillo, and they finding their own dresses for the equestrian performances; that the defendant would not, without the written permission

of the plaintiff, take part in any performance or entertainment, or in the preparation or rehearsal thereof, at any other theatre or place of amusement, and that he would to the utmost of his ability promote the success of every performance or entertainment which might be produced by the said plaintiff; that the plaintiff should pay to the defendant and the said Caroline the weekly salary of 5*l.* for their said services, subject to the deduction thereout of any fines or forfeits which might become payable, by virtue of the said rules and regulations, during the said engagement, except on Ash-Wednesday, Good-Friday, Christmas-Day, or when, in case of fire or other casualty to the said amphitheatre, or by reason of the death of any of the Royal Family, or by command or recommendation of the lord chamberlain, or other authority, the said theatre should be closed to the public,—in any of which cases, the said salary should cease, *or a proportionate reduction should be made therefrom, while the said theatre should remain closed; that, in [*284 case of default by either party to the said agreement, in any act, matter, or thing in respect of which no fine, forfeit, or provision should be declared in the said rules and regulations, the party making such default should pay 50*l.* as liquidated damages, which should be in full satisfaction of all claims in respect of such breach of contract; and that, in every such case, the said agreement, as far as respected the said party making such default, should be liable to be avoided and annulled, if the other party should think fit: Mutual promises: Averment, that, although the plaintiff had an establishment at Peebles, in that part of the united kingdom of Great Britain and Ireland called Scotland, under his direction, for equestrian performances and entertainments, and although the plaintiff was ready and willing to furnish two horses for the defendant and the said Caroline, according to the said agreement, and although, under and in pursuance of the said agreement, and during the subsistence of the said agreement, and before the expiration of the said term of three months, to wit, on, &c., the plaintiff gave notice to the defendant, that he, the plaintiff, required the defendant and his said wife to join the plaintiff's said establishment at Peebles aforesaid, under the direction of the plaintiff, for the purpose of appearing, performing, and assisting in the performances and entertainments to be produced at the said establishment of the plaintiff, at Peebles aforesaid, under the direction of the plaintiff, and although a reasonable time had elapsed, after the giving of the said notice, and before the commencement of the suit, for the defendant and the said Caroline to join the said establishment of the plaintiff at Peebles aforesaid, for the purpose aforesaid, and although the plaintiff had always been ready to perform his part of the said agreement,—*yet that the defendant and the said Caroline did not nor would, nor did nor would either of them, when so re- [*285 quired as aforesaid, or at any time afterwards, join the said establishment of the plaintiff at Peebles aforesaid, or appear, perform, or assist

in the performances and entertainments to be produced at the said establishment of the plaintiff at Peebles aforesaid, but wholly neglected and refused so to do, and therein failed and made default; and that thereby, and because the said default was and is a default in an act in respect of which no fine or forfeit or provision was declared in the said rules and regulations, the defendant became liable to pay the said sum of 50*l.* in the said agreement in that behalf mentioned, but that he neglected and refused so to do, &c.

To this declaration, the defendant demurred specially; the causes of demurrer assigned being, amongst others,—that the requisition to the defendant and his wife to join the establishment for the purpose of performing, did not express that they were to appear in performances “on the stage, or in the ring,” nor, with certainty, that they were required to appear as equestrians, nor that the establishment for equestrian performances was of such performances “on the stage and in the ring;”—that there was no allegation that a reasonable time had elapsed after giving the notice, and before the expiration of the three months;—that no promise to join the establishment was alleged;—and that the declaration showed no breach of the alleged promise.

Cleasby, in support of the demurrer.—The promise is a promise by the defendant to perform all acts on *his* part to be performed; and the breach is, non-performance of the agreement *by the defendant and his* *286] *wife*. There is no allegation that the defendant undertook *any- thing with respect to his wife. Again, the agreement is, that the defendant and his wife shall appear and perform at Astley’s, or *elsewhere*, when required. The court cannot judicially know where Astley’s Amphitheatre is situate: but the venue is laid in Middlesex, and the agreement may be assumed to have been entered into there: and a reasonable construction must be given to it. Now, it appears that the defendant and his wife were required to go to Peebles, in Scotland. The plaintiff might as well have required their attendance at New York, or at any other place out of the Queen’s dominions. [CRESSWELL, J.—Confining it to Her Majesty’s dominions, it would embrace an equally wide field.] The promise is, to appear and perform, for the term of three months from the date of the agreement, in all entertainments which might be produced, at Astley’s, or elsewhere, under the direction of the plaintiff: the breach is, the not attending at Peebles. But there is no allegation that the plaintiff had any theatrical establishment at Peebles, *within the three months*; for, although it is alleged that the plaintiff gave the defendant notice within the three months, that he required the defendant and his wife to join his establishment at Peebles, it does not follow that he had an establishment there at the time of giving the notice. [WILDE, C. J.—Might he not wait to see if he could get riders, before he took a place?] Further, the notice does not specify *when* the defendant and his wife were required to appear. [TALFOURD,

J.—The objection is, that it does not appear that the requisition was one which the defendant was bound to obey. The notice might have been given on the day before the expiration of the three months, requiring the attendance of the parties at the distance of a month.] That obviously is a fatal objection.

**Prentice*, *contra*.—The first objection is unfounded; it appears expressly on the face of the declaration, that the defendant contracted for himself and his wife. It is objected in the next place, that the contract is unreasonably wide,—obliging the defendant to attend out of the limits of the Queen's dominions. But there is nothing unreasonable or illegal even in such a contract, if the parties thought proper to enter into it. For anything that appears, this agreement may have been made on the borders of Scotland. The next objection is, that it is not distinctly alleged in the declaration that the plaintiff had an establishment at Peebles within three months from the date of the agreement. This, however, is not pointed out as a ground of demurrer: and it is submitted that the averment is sufficient in this respect, on general demurrer. In Chitty on Pleading, 7th edit. Vol. I. p. 273, it is said, that, "where in one continued sentence, or in several sentences connected by the conjunction 'and,' several facts are stated, the time, though only once alleged, will apply to each fact: as, in trespass, that the defendant, on, &c., at, &c., made an assault on the plaintiff, and took and carried away a bag."(a) It does, therefore, sufficiently appear that the plaintiff had an establishment at Peebles at the date of the contract, and that the defendant and his wife were required to attend there within the three months. They were bound to join the establishment without any request: the request is, to perform. [CRESSWELL, J.—There is no averment that the defendants were informed in what parts they were required to appear. [TALFOURD, J.—There is no allegation that they were called upon to appear and perform "as equestrians, on the stage, or in the ring." The notice is, to join the establishment.] The substance of the declaration is, that the defendant promised to perform when required, that he had notice on a certain day to appear and perform, and that he refused to do so. The notice and the refusal were both within the three months.

Cleasby, in reply.—If the defendant was called upon to appear, without being told in what manner he was required to appear, his refusal clearly would be no breach of the contract,—which expressly defines the particular class of performances in which the defendant and his wife were to assist. [WILDE, C. J.—The action appears to have been commenced within three months of the date of the agreement.] *Cur. adv. vult.*

(a) Citing *Taylor v. Welsted*, Cro. Jac. 443; *Webb v. Turner*, Andr. 250; Com. Dig. *Pleader* (C. 19); *Garret v. Johnson*, 1 *Ld. Raym.* 576; *Lowe v. Kirby*, Sir W. Jones, 56; *Lane v. Thelwall*, 1 *M. & W.* 140,† 4 *Dowl. P. C.* 705; *Jackson v. Cawley*, 6 *Dowl. P. C.* 388; *Bingley v. Durham*, 8 *Ad. & E.* 775 (*E. C. L. R.* vol. 35), 1 *P. & D.* 58; *Leaf v. Lees*, 4 *M. & W.* 579,† 7 *Dowl. P. C.* 189; *Webb v. Baker*, 7 *Ad. & E.* 841 (*E. C. L. R.* vol. 34), 3 *N. & P.* 87.

MAULE, J., now delivered the judgment of the court.(a)

This case came before us on a special demurrer to the declaration, which was on promises. [His lordship stated the substance of the pleadings.]

We have considered the arguments addressed to us in this case, and are of opinion that the declaration is good in substance, and is not defective in any of the respects pointed out as grounds of special demurrer. It seems to us that the promise to appear in any place under the direction of the plaintiff, in the performances described, in such parts and manner as the plaintiff should require, and to attend all calls and rehearsals, *289] involves an engagement so to join an establishment of *the plaintiff for equestrian performances as to be ready to accomplish the objects of the requisition; and that a failure to comply with such a requisition, and a refusal to assist in such performances, are sufficiently alleged to show a breach of the plaintiff's contract. The objections to the generality of the requisition, as not stating the performances intended to be equestrian or on the stage and in the ring, appear to us unfounded; for, as the establishment of the plaintiff at Peebles is alleged to be "for equestrian performances," it may be reasonably intended that such were the performances at which the defendant was required to assist; and it cannot be assumed that such performances were other than "on the stage or in the ring,"—which words are obviously used in the agreement, not to restrict the obligation of the defendant, but to expand it, as embracing both modes of equestrian representation.

The objection that there is no averment that a reasonable time elapsed after the notice and before the expiration of the three months, is obviated by the statement that the writ was issued on the 23d of August, 1848,—much within that time; and is supplied by the averment that such time had elapsed before the commencement of the suit.

The breach substantially shows an entire refusal of the defendant to perform his contract, which would render any particular appropriation of characters on the plaintiff's part unnecessary: and, although this part of the declaration might have been more artificially framed, it seems to us, that, in the absence of any other objection to it than the general one that the declaration does not show any breach by the defendant of his promise, it discloses a good cause of action.

On the whole, therefore, our judgment will be for the plaintiff.

Judgment for the plaintiff.

(a) WILDE, C. J., MAULE, J., CRESSWELL, J., and TALFOURD, J.

*CALLANDER v. HOWARD. June 24.

[*290]

To assumpsit on three bills of exchange, for 300*l.*, 334*l.*, and 278*l.* respectively, with a count for goods sold and delivered, money paid, and interest, and a count upon an account stated, the defendant pleaded, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and the plaintiff accounted together of and concerning the said causes of action, and of and concerning certain other claims and demands of the plaintiff against the defendant, and certain other claims and demands of the defendant against the plaintiff, and that, on that accounting, 50*l.*, and no more, was found to be due from the defendant to the plaintiff, which sum the defendant, in consideration of the premises, promised the plaintiff to pay to him on request; and that, afterwards, and before the commencement of the suit, the defendant paid to the plaintiff, and the plaintiff accepted and received from the defendant, 50*l.*, in full satisfaction and discharge of such last-mentioned sum:—

Held, on special demurrer, that the plea amounted to an allegation of the allowance of cross-demands upon an account stated, and payment of the balance, and afforded substantially a good defence to the action: and that it was unexceptionable in point of form.

A plaintiff may be entitled, under the statute 4 Ann. c. 16, s. 5, to the costs of issues of fact found for him, even though, upon the whole record, he appears to have had *no cause of action*.

To assumpsit upon certain bills of exchange, with a count for goods sold and delivered, money paid, and interest, and a count upon an account stated, the defendant pleaded sixteen pleas, to one of which (*going to the whole cause of action*) there was a demurrer. Upon the trial, *all* the issues of fact were found for the plaintiff; and, upon the argument of the demurrer, the judgment was for the defendant:—Held,—contrary to *Partridge v. Gardiner* and *Howell v. Rodbard*, 4 Exch. 303, 309, and affirming *Bird v. Higginson*, 5 Ad. & E. 83, 6 N. & M. 799, and *Clarke v. Allatt*, 4 Com. B. 335,—that the plaintiff was entitled to the costs of the issues of fact, though the defendant had the general costs of the cause.

THIS was an action of assumpsit by the drawer against the acceptor of three bills of exchange, for the respective sums of 300*l.*, 334*l.*, and 278*l.* The declaration contained five counts,—the first three upon the bills,—the fourth for goods sold and delivered, money paid, and interest,—and the fifth for money found due upon an account stated.

The defendant pleaded sixteen pleas,—four to the first count, four to the second count, three to the third count, one to the last two counts, and four to the whole declaration.

Issues of fact were taken upon all the pleas except the fifteenth, which was as follows:—

That, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on, &c., the defendant and the plaintiff accounted together, and an account was then stated between them, of and concerning the said causes of action, and of and concerning certain other claims *and demands of the plaintiff [*291] against the defendant, and certain other claims and demands of the defendant against the plaintiff, and on that accounting a certain small sum and no more, to wit, the sum of 50*l.*, was then found to be, and then was, due and owing from the defendant to the plaintiff, which sum of money the defendant then, in consideration of the premises, promised the plaintiff to pay him on request; and that thereupon the defendant, afterwards, and before the commencement of this suit, to wit, on the 13th of January, 1848, paid to the plaintiff, and the plaintiff then

129 Mass 51: 72 June 30, 146 N. H. 224.

accepted and received of and from the defendant, a large sum of money, to wit, the sum of 50*l.*, in full satisfaction and discharge of such last-mentioned sum so due and owing from the defendant to the plaintiff as last aforesaid,—verification.

To this plea there was a special demurrer, and a joinder in demurrer.

Channell, Serjt. (with whom was *Willes*), in support of the demurrer.—The plea is clearly bad: it does not show what were the claims and demands which the defendant had against the plaintiff, or that they were just, or even doubtful claims, so that their extinguishment would be a consideration: it does not even show that they were *debts*; for anything that appears, they may have been claims to compensation for alleged trespasses or assaults. If the substance of the plea was a set-off, it should have been so pleaded, in terms following the precedent in *Learmonth v. Grandine*, 4 M. & W. 658.† The case of *Sutton v. Page*, 3 Com. B. 204 (E. C. L. R. vol. 54), will probably be relied on in support of this plea. There, to a count by endorsee against acceptor of a bill of exchange, the defendant pleaded, that, after the accruing of the *292] causes of action in the *declaration, and before the commencement of the suit, the defendant and plaintiff accounted together of and concerning the said causes of action, *and all other claims and demands then being between the plaintiff and the defendant*; and that, on that accounting, a certain sum only was found due to the plaintiff, which sum the defendant paid, and the plaintiff received, in full satisfaction of the sum so due and owing as last aforesaid: the plaintiff replied, that he and the defendant did not account together of and concerning the causes of action in the declaration, *and of all other claims and demands then being between the plaintiff and the defendant, modo et formâ*: and it was held, that the traverse was well taken. [WILLIAMS, J.—That is very nearly the same as this plea.] The validity of that plea was not questioned on the argument, though a doubt is suggested in a note at the end of the report.(a) [WILDE, C. J.—The common count upon an account stated never discloses the nature of the debt.] But enough *is* stated to show that the demand is in the nature of a debt. Here, it is not alleged that the plaintiff agreed that his claims upon the defendant should be extinguished, or that the 50*l.* should be accepted in satisfaction.

Crompton, contrâ.—The plea is good: it follows the old form; and the plaintiff could have no difficulty in taking issue upon it. In Com. Dig. *Pleader* (2 G. 11), it is said, “To an assumpsit, the defendant may plead, that, since the promise made, he and the plaintiff *insimul computaverunt, et super comptot.*(b) *ill' ipse inventus fuit* in arrear, so much, which he has paid.(c) That is an authority which will be found referred to in almost all *293] *the cases upon the subject. In *Smith v. Page*, 15 M. & W. 683,† it was held, that, in *indebitatus assumpsit* for money due on

(a) On the ground that the account was not alleged to embrace any claim against the plaintiff

(b) Sic.

(c) Citing *Brown's Vade Mecum*, 9*t.* 100.

an account stated, it is not sufficient to plead, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and plaintiff accounted together of and concerning the said causes of action, and all other claims and demands then being between the plaintiff and defendant, amounting to a large sum, to wit, 1000*l.*, and that, on such accounting, a small sum, to wit, 150*l.*, was then found to be due and owing from the defendant to the plaintiff, which the defendant then promised the plaintiff to pay, and afterwards, and before the commencement of the suit, paid to the plaintiff, who accepted it in full satisfaction for the sum due to him from the defendant; for, such a plea does not show, that, at the time of the second accounting relied on, any cross-demand by the defendant against the plaintiff existed, or that, if it existed, it had not been agreed to be given up by the defendant, in consideration of the plaintiff's giving up some other demand of his on the defendant, so as to make payment of the balance a satisfaction of the larger sum. PARKE, B., there says: "In order to make the plea good, as resting on the defendant's new promise merely, it should have alleged, that, after the accruing of the causes of action laid in the declaration, and before the commencement of the suit, an account was stated between the plaintiffs and the defendant, of and concerning the said causes of action, and of and concerning other demands of the plaintiffs against the defendant, and a certain other demand of the defendant against the plaintiffs: but, a plea merely alleging an account to have been stated between the parties respecting the causes of action declared on, would be bad, unless payment of the balance found due, was *averred*." Here, the plea sufficiently [*294 shows that there was a legal demand. Whether the accounting operates as a payment, or as a new promise, by which the old one is extinguished, may admit of doubt: some learned judges have inclined to think it operated as payment; others have treated it as an extinguishment, by giving a new cause of action. Thus, in *Ashby v. James*, 11 M. & W. 542,† ALDERSON, B., says: "The courts have never laid it down that an actual statement of a mutual account will not take the case out of the statute of limitations. They have indeed determined that a mere parol statement of, and promise to pay, an existing debt, will not have that effect, because, to hold otherwise, would be to repeal the statute. The truth is, that the going through an account, with items on both sides, and striking a balance, converts the *set-off* into *payments*." But ROLFE, B., says: "An actual settlement of accounts is not an acknowledgment or promise by words only.' It is a transaction between the parties, out of which a new consideration arises for a promise to pay the balance." This is in accordance with what is laid down in Com. Dig. *Action upon the Case upon Assumpsit* (G.), viz. that, "if A. be indebted to B., and afterwards they come to an account for all matters between them, this is a discharge of the debt." In *Scholey v. Wal-*

ton, 12 M. & W. 510,† PARKE, B., takes the same view that ALDERSON, B., took in *Ashby v. James*. TINDAL, C. J., in *Clark v. Alexander*, 8 Scott, N. R. 147, 163, and Lord DENMAN, in *Worthington v. Grimsditch*, 7 Q. B. 479, 484 (E. C. L. R. vol. 53), take a different view of the matter. Again, in *Pott v. Cleg*, 16 M. & W. 321, 327,† PARKE, B., says: “In *Ashby v. James*, the parties met, and stated accounts, and struck a balance; that was equivalent to a payment by one, and a repayment by the other.” In *Com. Dig. Accord* (B. 4), it is laid down, *295] that “an accord, with mutual promises *to perform, is good, though the thing be not performed at the time of action; for, the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise, at the time of the agreement.” [WILLIAMS, J., referred to the judgment delivered by PARKE, B., in *Evans v. Powis*, 1 Exch. 601.†] Serjt. Manning, in a note to *Cocking v. Ward*, 1 Com. B. 869 (d) (E. C. L. R. vol. 50), suggests, that, “in a *real* account stated, the extinction of cross demands *per confusionem*,—not the bare act of accounting,—appears to form the consideration of the promise to pay the balance.” In *Fidgett v. Penny*, 1 C. M. & R. 108,† on the 5th of February, an account was stated between the parties, and the balance was in favour of the plaintiff: on the 10th of March, another account was stated, and the balance was in favour of the defendant: the plaintiff afterwards sued upon the first account stated, and the defendant (after the new rules) pleaded non assumpsit: and it was held, that, under that plea, he could not avail himself of the defence of the second account stated. TINDAL, C. J., in *Cocking v. Ward*, 1 Com. B. 870 (E. C. L. R. vol. 50), lays down the following as the governing principle in these cases:—“After the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise: and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt, before such admission.” In *Learmonth v. Grandine*, the plea was a mere tricky plea of set-off: there was no reason why it should not have been pleaded according to the fact.

*296] *As to the form of the plea,—the defendant was not bound to show the precise nature of the claims and demands which he had against the plaintiff: the admission of them in the account shows that they were *legal* claims and demands. And it is sufficiently shown by the plea that the debt was extinguished.

Channell, Serjt., in reply.—In *Ashby v. James*, the question turned, not upon the form of pleading, but was whether the plea disclosed a transaction which amounted to payment, so as to take the case out of

the statute of limitations. Assuming the alleged claims and demands to have been debts, either the facts amounted to payment, or to set-off, or they showed an agreement that a given amount of the claims on the one side should be set against an equal amount on the other side, and that the plaintiff's debt should be considered as extinguished *pro tanto*; in either of which cases, the plea should have been framed accordingly.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:—

If the plea in this case amounts to an allegation of the allowance of cross demands upon an account stated, and payment of the balance, there seems to be no doubt but that it sets up substantially a good defence to the action. This appears to have been established, and the reason of the doctrine expounded, at a very early period. Thus, in Co. Litt. 213 a, it is said: "If the obligor or feoffor be bound by condition to pay one hundred marks at a certain day, and at the day the parties do account together, and for that the feoffee or obligee did owe 20*l.* to the obligor or feoffor, that sum is allowed, and the residue of the hundred marks paid, this is a good satisfaction; and yet the 20*l.* was a chose in action, and no payment was made thereof, but by *way of retainer or discharge." The authority cited for this [*297 passage, is, a case to that effect in the Year Book, 11 Ric. 2,(a)

(a) The reference is to Fitz. Abr. 11 R. 2, tit. *Barre*, pl. 243,—there being no Year Book of that reign. The case was this:—"Debt upon obligation, bearing date at C., brought by executors. The defendant says that the obligation is endorsed upon condition, that, if the obligor pay 100 marks at Whitsunday next following after the making, &c., at another place to the testator, then, &c. And he says, that, at the same feast, and at C., the testator and the defendant accounted together, and because the testator owed the defendant 20*l.* for another contract, the testator allowed the 20*l.* in payment of the 100 marks, and paid him the 100 marks on the day, &c. Judgment, &c. *Wadham* (Serjeant).—The condition is—if he pay—and he alleges no payment, and so he has (not) performed the condition. *Et non allocatur*. For, it was said that it was as well as if he had paid the testator, and the testator had repaid him. *Wadham*.—The payment was to have been made at another place, and not at C. *Et non allocatur*.

Fitzherbert refers to a case in 37 H. 6, which is as follows:—"P. 37 H. 6, fo. 26, pl. 16. In a writ of debt upon an obligation, the plaintiff counts by *Laicon*, &c. *Boeff* (Serjeant):—*Actio non*, because the obligation is endorsed with this condition, that, if the defendant grant to the plaintiff *citra festum Pentecostes* next coming, the rent and farm of such a mill, to have and perceive to him until he be satisfied and paid 6*l.*, the obligation shall then lose its force; and, after the obligation, and before the feast of Pentecost, the defendant leased to the plaintiff the said mill for term of years, rendering, &c., and that he (the plaintiff) retained in his hand so much of the said rent as amounted to 6*l.*: verification. *Laicon*.—This plea is bad; for, the condition is, if he grant the farm and rent of such a mill to the plaintiff; and he had shown by his plea that he has no rent or farm issuing out of the said mill at the time; for, the mill at that time was in his own hands; and, although he leased the mill afterwards, that is not of purpose to fulfil (*implier*) the condition, because the condition is, if he grant the rent and farm of his mill, by which it is to be understood that the rent and farm was *in esse* at the time of the obligation and condition; and, if not, the condition is void, and that confessed by him; and also the condition is, that he grant (to the plaintiff) to have and perceive, and he has shown that he cannot have and perceive from him, but only retain. Whereupon, as to the first point, *NEDHAM* (J.) held that the plea was good, as seemed to him; for, although the rent and farm were not *in esse* at the time of the obligation and condition, still they were *in esse* before the feast of Pentecost, and then that was sufficient, as it seems. So, if the mill had been leased for a term of years, rendering by the year 40*s.* before this obligation and condition, and so that at the making of the obligation and condition, the termor had but one year in the mill, (and) the rent and farm of the said year had been granted to the plaintiff, and afterwards he had made a new lease of the mill to another, rendering *ut supra*,

*298] which is stated in Roll. Abr. *Condition* *(E.), pl. 5, and translated in Vin. Abr. *Condition* (E. d.), pl. 5, where the reason for the decision is said to be, that "this is all one as if the obligor had paid to the obligee, and he had repaid him. *This is a payment by way of retainer.*"(a) This same case from the Year Book was also cited by the court in *Hayford v. Andrews*, Cro. Eliz. 697, and said to be good law; for, that the agreement to retain is as a payment, and thereby the obligation is discharged. And the same view was taken in the modern cases cited at the bar, viz., by ALDERSON, B., in *Ashby v. James*, 11 M. & W. 543,† by PARKE, B., in *Scholey v. Walton*, 12 M. & W. 513,† and by TINDAL, C. J., in delivering the judgment of this court in *Clark v. Alexander*, 8 Scott, N. R. 147, 163.

But, although these authorities demonstrate that a settlement of an account, in which one item is agreed to be set off against another, amounts to a payment of the sums thus set off, yet there are other authorities which show that this adjustment of the account, together with the implied or express promise to pay the balance, cannot be regarded as an extinguishment of the original debt; and, consequently, that it cannot be set up, by a plea in *assumpsit*, as affording, *per se*, a defence to an action, but must be treated in pleading as a payment. A *299] contrary view, indeed, was taken in the *case of *Milward v. Ingram*, 2 Mod. 43, S. C. 1 Mod. 205, 1 Freem. 195. There, in an action of *indebitatus assumpsit*, the defendant acknowledged the promises laid in the declaration, but pleaded, that, afterwards, and before action brought, the plaintiff and he accounted together concerning divers sums of money, and that, on the foot of the account, he was found to be indebted to the plaintiff in 30*s.*; whereupon, in consideration that the defendant promised to pay him that sum, the plaintiff likewise promised to release and acquit the defendant of all demands: and, on demurrer, this was held a good plea: and NORTH, C. J., though he conceded,(b) that, if there were but one debt betwixt the plaintiff and the defendant, entering into an account for that would not determine the contract, expressed his opinion,(c) that, after such an account as that stated in the plea, the plaintiff could never have recourse to the first contract, which was thereby merged in the account. "If," said Lord Chief Justice NORTH, "A. sells his horse to B. for 10*l.*, and, there being divers other dealings between them, they come to an account upon the whole, and B. is found arrear 5*l.*, A. must bring his *insimul computasset*; for, he can never recover on an *indebitatus assumpsit*."

and then he had granted to the plaintiff the said rent and farm of another year, which would amount to 6*l.*—would not the condition have been performed? *Quasi diceret sic.* Latoun denied, and said he thought not: so here. But he said the matter was good. But as to the second point, he (NEDHAM, Just. C. P.) held the condition to be already performed well enough; for, it is common for one to have the rent and farm by way of receipt by another hand. *Et adjournatur.*

(a) The words in italics are Lord ROLLE's.

(b) 1 Mod. 206.

(c) 2 Mod. 41.

And of the same opinion were the other three justices. But this opinion has been since overruled. Thus, in *The Mayor of Scarborough v. Butler*, 3 Lev. 237, where, in assumpsit for 60*l.* as money had and received by the defendant to the plaintiffs' use, the defendant pleaded, that, after the promise, he and the plaintiffs accounted, and on the account the defendant was found in arrear to the plaintiffs (*allocatis allocandis*) in 14*l.* only, which he tendered, and they refused, and *toujours prist*, &c.; and the plaintiffs replied, that, on the said account, the *defendant was found in arrear 60*l.*, *absque hoc*, that he was found in [*300 arrear 14*l.* only; on which issue was joined, and found for the plaintiffs, with 60*l.* damages,—it was moved to arrest the judgment, because it appeared by the replication that there had been an accounting on the contract declared upon, whereby the action and the duty had been extinguished by the account, and the action ought to have been brought upon that only. But the court gave judgment for the plaintiffs, saying that the new promise on the account, was only a *chose in action*, and that one *chose in action* could not be discharged by another *chose in action* of the same nature.

Again, in *May v. King*, 12 Mod. 538, 1 Ld. Raym. 680, indebitatus assumpsit was brought for 40*l.*, for work done, and on a *quantum meruit* for the same: the defendant pleaded, that, there being mutual dealings between the plaintiff and him, they came to an account, and that it did appear on the account that the defendant was in arrear to the plaintiff but 5*l.*, which he promised to pay him; in consideration whereof the plaintiff did discharge him of the said debt and claim: and, on demurrer, this was held a bad plea. And, per HOLT, C. J., "If one bind himself in a bond for the payment of 20*l.* to A. by a day certain, and A. buy a horse of the obligor, of the value of 20*l.*, before the day, and then they two account together, and 20*l.* is set and agreed for the horse; in an action brought upon the bond, he cannot plead the general issue; yet he may plead solvit ad diem, and must not plead it by way of account, but it must be pleaded according to the operation it has in law, and that is to be a payment; and so here. As, if tenant for life grant his estate to him in reversion, it is a surrender, and must be pleaded as such, and not by way of grant: so, here, to plead this by way of account, when the operation in law is payment, will be ill. And, *per ipsum*,—If *there be two dealers, and, without coming to an account, [*301 they agree to be clear against one another, it would not be well, without coming to an account: and the case quoted out of the Moderns was the first of this kind, and by my consent shall be the last. And to plead it as an account, is but argumentative of *payment*, which is direct, and therefore not to be allowed." On the authority of this case, those of *Adderley v. Evans*, (a) and *Rolls v. Barnes*, 1 W. Blac. 65, S. C. 1 Burr. 9, 1 Ld. Ken. 391, per nom. *Roades v. Barnes*, were decided. The case of

(a) *Atherley v. Evans*, Bay. Rep. 269. 1 Ld. Ken. 250.

Adderley v. Evans was assumpsit by an executor, for 12*l.*, due to the testator for work and labour, &c.: plea, that the testator and the defendant accounted together, and the defendant was found in arrear 12*l.* and had paid 10*l.* to testator, and the remaining 2*l.* to plaintiff: and this was held a bad plea, on demurrer. This case was followed by *Rolls v. Barnes*, where, in assumpsit, the defendant pleaded a stated account between himself and the plaintiff before action brought, and a balance in favour of himself, the defendant, and that the plaintiff promised to pay such balance; and this was held to be no good plea.

Without overruling the three cases last mentioned, it appears to us to be impossible to deny that this plea is bad, unless it in effect sets up the allowances in account by way of partial payments, and an actual payment of the residue; and that it is not enough to plead merely the accounting, notwithstanding the plea proceeds to aver a payment of the balance: for, although there was no such averment in the plea which was held bad in *May v. King*, yet there was such in *Adderley v. Evans*; and, in *Rolls v. Barnes*, the balance on the accounting was in favour of the defendant.

*302] *The question, therefore, is, whether the plea in the present case can be regarded as treating the allowances in account as partial payments.

The passage cited at the bar, from Com. Dig., *Pleader* (G. 2), and the case of *Richardson v. Rickman*, stated in *Kearslake v. Morgan*, 5 T. R. 513, and the *dictum* of PARKE, B., in *Smith v. Page*, 15 M. & W. 686, 687,† are in favour of the plea. And it should be observed, that, in *Adderley v. Evans*, and in *Rolls v. Barnes*, no satisfactory reason is suggested why the plea should not be regarded as amounting to a plea of payment. It is certainly convenient to plead it in the present shape, rather than to plead it directly as a plea of payment; because it explains to the plaintiff in what way the defendant proposes to contend that the payment has taken place. And, if it should be objected that the plea ought to have stated with particularity the counter-claims, on the allowance of which it is intended to insist, the answer is, that, in many cases, the so doing would lead to great and inconvenient length and complexity of pleading.

On the whole, therefore, we think the plea is sufficient, and that our judgment ought to be for the defendant.

Judgment for the defendant.

Nov. 25. THE issues of fact were tried before WILDE, C. J., at the sittings in London, after Michaelmas term, 1849, when a verdict was found for the plaintiff upon all of them, with damages contingently assessed at 430*l.*

Upon the taxation of costs, the master allowed the defendant the costs of the demurrer, and also the general costs of the cause (exclusive of the costs of the *issues of fact), on the ground that *he had succeeded upon an issue which went to the whole cause of action.* [*303] The plaintiff claimed to be entitled to the costs of the issues of fact which had been found for him: but the master refused to allow them, inasmuch as none had been found for the defendant.

Willes, on a former day in this term, moved for a rule calling upon the defendant to show cause why the taxation should not be reviewed. He contended, upon the authority of *Bird v. Higginson*, 5 Ad. & E. 83 (E. C. L. R. vol. 31), 6 N. & M. 799, that the plaintiff was entitled to the costs of the trial on the issues on which he had succeeded; admitting, at the same time, that that case had been considered, and deliberately overruled, by the Court of Exchequer, in two recent cases, viz., *Partridge v. Gardner*, 4 Exch. 303, † 7 D. & L. 106, and *Howell v. Rodbard*, 4 Exch. 309, † 1 Lowndes, M. & P. 547. [MAULE, J., referred to *Clarke v. Allatt*, 4 Com. B. 335 (E. C. L. R. vol. 56), where this court adopted the view taken in *Bird v. Higginson*, but which case was not noticed in the cases in the Exchequer.] A rule nisi having been granted,

John Gray showed cause.—The master was right in disallowing to the plaintiff the costs of the trial of the issues of fact. The Court of Exchequer, in the two cases referred to,—*Partridge v. Gardner*, and *Howell v. Rodbard*,—overruling the case of *Bird v. Higginson*, expressly decide that a plaintiff, under circumstances like the present, is [*304] not entitled to costs under the *statute of Gloucester (6 Edw. 1, c. 1), and that the statute 4 Ann. c. 16, s. 5, does not apply where the plaintiff succeeds upon *all* the issues in fact. The question, therefore, will be, whether the statute of Anne does or does not give the plaintiff costs. In the earliest case upon this subject, *Yates v. Gun, Barnes*, 141, this court determined that a plaintiff who succeeded upon an issue in fact, was entitled to the costs of that issue, although the defendant succeeded upon an issue in law: no reasons, however, are given for that conclusion. In the next case, *Cooke v. Sayer*, 2 Burr. 753, 2 Wills. 85, the Court of King's Bench arrived at the opposite result, upon exactly the same state of facts; though it must be admitted that the reasons given by Lord MANSFIELD are not very satisfactory. The case of *Bird v. Higginson* is the next in order: there, to a declaration in two counts, the defendant pleaded two pleas to the first count, and one to the second count. Issues were joined on one plea to the first count, and on the plea to the second count: the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for him on the issue on the first count, and damages assessed, and for the defendant on the issue on the second count. Afterwards, on demurrer to the other plea to the first count, the defendant had judgment. The Court of Queen's Bench,—in oppo-

sition to the decision in *Cooke v. Sayer*,—held that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleadings) the briefs, witnesses, &c. Lord DENMAN, in delivering the judgment of the court,—adverting to the 4 Ann. c. 16, s. 5, and observing upon *Jones v. Davies, Barnes, 140*, *Bartlet v. Spooner, Bull. N. P. 335*, *Barnes, 461*, *Dayrell v. *Briggs, Bull. N. P. 335*, *Duberley v. Page, 2 T. R. 391*, *305] *Benett v. Coster, 1 B. & B. 465* (E. C. L. R. vol. 5), 4 J. B. Moore, 110 (E. C. L. R. vol. 16), and *Hart v. Cutbush, 2 Dowl. P. C. 456*,—there says: “These cases show that the construction and the practice on the statute of Ann. has been, to give the plaintiff his costs on the issues found for him, whether they be issues of fact or issues of law, even though, upon the other issues, the judgment be such as that the defendant has judgment on the whole record.” *Clarke v. Allatt, 4 Com. B. 335* (E. C. L. R. vol. 56), merely follows *Bird v. Higginson*. Then come the cases of *Partridge v. Gardner, 4 Exch. 303*,† 7 D. & L. 106, and *Howell v. Rodbard, 4 Exch. 309*,† 1 Lowndes, M. & P. 547, distinctly and deliberately overruling *Bird v. Higginson*. In *Partridge v. Gardner*, to a declaration in assumpsit the defendant pleaded several pleas upon which issues were joined, and also a plea to which the plaintiff demurred: the issues in fact were tried, and found for the plaintiff, and afterwards, judgment was given for the defendant on the demurrer,—*the court holding the declaration insufficient*: and it was held, that the plaintiff was not entitled, under the 4 Ann. c. 16, s. 5, to the costs of the issues found for him, *as no issue in fact had been found for the defendant also*. PLATT, B., in delivering the judgment of the court, says: “A plaintiff’s right to costs in an action of assumpsit, is derived either from the statute of Gloucester, 6 Edw. 1, c. 1, s. 2, or the 4 Ann. c. 16, s. 5. As, however, the plaintiff in this action has not recovered damages, he is not entitled under the statute of Gloucester; and, as all the issues in fact have been found for him, the construction which, in *Richmond v. Johnson, 7 East, 583*, Lord ELLENBOROUGH and the rest of the judges of the King’s Bench unanimously *306] put on the 5th section of the 4 Ann. c. 16, *and which, since the decision of that case, until that of *Bird v. Higginson*, has been invariably adopted, equally excludes him from any right to costs under that section. All the authorities adduced in the judgment of the Court of King’s Bench in *Bird v. Higginson*, as bearing upon the question of the plaintiff’s right to costs under the statute of Anne, except *Yates v. Gun, Barnes, 141*, are consistent with that construction. In *Cooke v. Sayer, 2 Burr. 753*, 2 Wils. 85, the defendant did not obtain a verdict on any issue in fact, but was entitled to judgment on the whole record. The court, therefore, consistently with the above-mentioned construction, held that the plaintiff was not entitled to the costs of the trial. In *Jones v. Davies, Barnes, 140*, some issues in fact were found for the

defendant. The plaintiff was, under the 5th section, entitled to tax and deduct the costs of the issues found for him. In *Bartlett v. Spooner*, Bull. N. P. 335, Barnes, 461, the plaintiff was not entitled to the deduction, as a verdict had not been found for him upon any issue. Issues in fact were found for the defendants in *Benett v. Coster*, 1 B. & B. 465 (E. C. L. R. vol. 5), 4 J. B. Moore, 110 (E. C. L. R. vol. 16), *Hart v. Cutbush*, 2 Dowl. P. C. 456, *The Duke of Newcastle v. Green*, cited in that case, *Othir v. Calvert*, 1 Bing. 275 (E. C. L. R. vol. 8), 8 J. B. Moore, 239 (E. C. L. R. vol. 17), and *Spencer v. Hamerton*, 4 Ad. & E. 413 (E. C. L. R. vol. 31), 6 N. & M. 22; and for the plaintiffs in the replevin, in *Vollum v. Simpson*, 2 B. & P. 368, *Bright v. Jackson*, Barnes, 144, *Dodd v. Joddrell*, 2 T. R. 235, and *Brooke v. Willet*, 2 H. Blac. 435. In *Duberley v. Page*, 2 T. R. 391, the plaintiff was entitled under the first provision of the 5th section, which relates to issues in law only. The application in *Vivian v. Blake*, 11 East, 263, must have been for the general *costs. Vivian was clearly entitled to the deduction of the costs [*307 of the issue found in his favour. To this consistent collection of authorities, the case of *Yates v. Gun*,—which, if correctly reported by Barnes, was substantially overruled by the Court of King's Bench in *Richmond v. Johnson*,—was, before the decision in *Bird v. Higginson*, alone opposed.” [WILLIAMS, J.—It seems somewhat singular to say that a plaintiff shall be in a better position, with reference to costs, if he fails upon one or more issues in fact, than if he is successful upon them *all*. JERVIS, C. J.—The Court of Exchequer do not advert to the case in this court, confirming *Bird v. Higginson*,—*Clarke v. Allatt*, 4 Com. B. 335 (E. C. L. R. vol. 56); nor do they seem to have entered into any discussion of the terms of the statute of Anne.] In *Howell v. Rodbard*, 4 Exch. 309,† 1 Lowndes, M. & P. 547, the declaration contained two counts, each for an injury to the reversion,—the first count, for damage to the surface of the land, the second, for damage to the foundation of a house. The defendant pleaded,—first, not guilty,—secondly, to both counts, *nul tiel* reversion,—thirdly, to the first count, a justification under a mining lease, to which there was a replication, demurrer, and judgment thereon for the defendant,—fourthly, to both counts, the statute of limitations,—fifthly, a plea as to which the jury were discharged by consent: there was also a new assignment, with a plea of not guilty. At the trial there was a verdict, on not guilty as to part of the first count, for the plaintiff, with 140*l.* contingent damages, and, as to the residue of the first and second counts, for the defendant; on the plea denying the reversion, and as to the plea of the statute of limitations, as to both counts, for the plaintiff; and upon the new assignment, the verdict was for the defendant. And PARKE, B., in delivering the judgment of the court, said: “The *case differs [*308 both from that of *Bird v. Higginson* and *Partridge v. Gardner*: [*308 from the former, because there the only issue on the trial, as to one

cause of action, that in the first count, was found for the plaintiff; from the latter, because in it all the issues on the trial were found for the plaintiff. We adhere to our decision in the case of *Partridge v. Gardner*, which we are satisfied was perfectly correct. The plaintiff can recover costs only under the statute of Gloucester, as part of the damages, or under the statute of Anne, s. 5, where there are double pleas. Here, he has no right under the statute of Gloucester as to the part on which damages were assessed, as he cannot have judgment for those damages on that part; nor, as to that part, under the statute of Anne, because the plaintiff has succeeded on the trial on all the issues as to that part of the count; and, according to the construction put by the cases on that statute, it only applies where the defendant succeeds on some one issue which entitles him to judgment on the whole record; that is, as to all the causes of action, or any one of them, to which there is double pleading, that is by way of punishment for improper double pleading: for, if the plaintiff succeeds as to the whole of the causes of action, or one, his only claim is under the statute of Gloucester. Here, the plaintiff succeeds on all the issues as to part of the first count, but fails on the demurrer, and can have no judgment on that part of the first count to recover his damages, and no costs as to that part of the first count. But, to the second count, and part of the first, there is double pleading, and the defendant has succeeded on the first issue as to part of the first, and as to the second count, and the plaintiff has obtained a verdict on the issues on two other special pleas to the same cause of action; therefore, as to part of the first, and the second count, it is a case of double pleading, and, as to that part of

*309] the first, and the second count, the plaintiff is entitled to the costs of the special pleas, under the statute of Anne, not confined to the mere costs of the pleadings, but including a portion of the expenses of briefs and witnesses, according to the rule laid down in *Hart v. Cutbush* and *Spencer v. Hamerton*." [JERVIS, C. J.—There, again, the terms of the statute of Anne do not seem to be at all adverted to.] The court had their attention drawn to that statute, and must have considered it. *Partridge v. Gardiner* and *Howell v. Rodbard* are founded, in part, upon a class of cases, of which *Richmond v. Johnson*, 7 East, 583, was the first. It was there held, that, if there be a certificate against any more costs than damages, upon the statute 43 Eliz. c. 6, s. 2, the plaintiff shall not have the costs of the double pleas on which all the issues were found for him, although the judge has not certified, under the statute 4 Ann. c. 16, s. 5, that the defendant had probable cause to plead the several special matters; that section, which says, that, "if a verdict be found on any issue for the plaintiff, costs shall be given, &c., unless the judge who tried the cause shall certify," &c., only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. Lord ELLENBOROUGH says: "The statute of Anne meant to give an advantage to a defendant, of

pleading several matters; though, in so doing, it provided that such privilege should not be exercised vexatiously to the plaintiff: therefore it says, that, if any *issue* shall be found for the plaintiff, he shall have costs, &c., unless, &c.; by which I understand, that, if any one or more of several issues be found for the plaintiff, the rest being found for the defendant, the plaintiff shall have his costs of those pleas found for him, unless the judge *shall certify, &c. This was to check a superfluous [*310] fluity of pleading, and was necessary to be introduced where any one bar was found for the defendant, which would give him the general costs of the cause, except for this provision: but, where all the issues were found for the plaintiff, he did not want any new provision to give him the costs of the pleadings. And this shows that the statute of Anne was not meant to apply to such a case. Where, indeed, the case is within the 5th section of that statute, as, if, upon demurrer joined, the matter be judged insufficient, the costs are in the discretion of the court only as to the *quantum*; that is, to be taxed by the proper officer, as in other cases; or, if a verdict be found upon any issue for the plaintiff, &c., which is to be understood in the sense I have before mentioned—‘unless the judge who tried *the said issue* shall certify,’ &c.; and in that case the defendant shall be exempted from the costs of those issues found for the plaintiff, which he would otherwise have been obliged to pay.” That view has been adopted in many later cases. The statute of Anne, upon which the question arises, speaks only of issues of *fact*. The 4th section enables “any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence.” And the 5th section provides, “that, if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or, if a verdict shall be found, upon *any issue* in the said cause, for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue, shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.” When it speaks of a verdict upon **any issue*, the statute [*311] evidently means any issue *in fact*. [WILLIAMS, J.—The statute of Anne applies only to cases where the defendant obtains judgment upon the whole record,—where, but for the statute, the plaintiff would be entitled to no costs. If that be so, it distinguishes *Richmond v. Johnson*, *Hart v. Cutbush*, and that class of cases, from *Bird v. Higginson*, and shows that the latter was well decided.] That is directly contrary to the decision of the Court of Exchequer in *Partridge v. Gardner* and *Howell v. Rodbard*.

Willes, in support of his rule.—However conflicting and contradictory may be the decisions in the other courts upon this subject, those of this court have been uniformly consistent. The ruling of this court in *Yates*

v. Gun, Barnes, 141, was adopted by the Court of King's Bench in *Bird v. Higginson*, 5 Ad. & E. 88 (E. C. L. R. vol. 31), 6 N. & M. 797, overruling the previous decision of their own court, in *Cooke v. Sayer*, 2 Burr. 753, 2 Wils. 85; and *Yates v. Gun* and *Bird v. Higginson* were again acted upon in this court, in *Clarke v. Allatt*, 4 Com. B. 335 (E. C. L. R. vol. 56). The rule as to dealing with conflicting authorities, is aptly stated by BEST, C. J., in a case of *Newton v. Cowie*, 4 Bingh. 234, 241 (E. C. L. R. vols. 13, 15), 12 J. B. Moore, 457 (E. C. L. R. vol. 22). "If," he says, "the authorities are consistent, we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law. If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them. If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction *312] *on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them." It is a fallacy to suppose that the Court of Exchequer, in coming to the conclusion they did in *Partridge v. Gardner* and *Howell v. Rodbard*, proceeded only upon the statute of Anne. The ground they proceed upon, is stated distinctly and at large, so as to leave no room for doubt: it rests entirely upon the decision of Lord ELLENBOROUGH in *Richmond v. Johnson*, 7 East, 588. In that case, there were several issues of fact, none of law: the plaintiff recovered upon all the issues; but he was barred of his costs, by a certificate under the 43 Eliz. c. 6, s. 2. There was, therefore, no necessity for pronouncing any decision as to whether or not, if there had been a demurrer on the record, going to the whole cause of action, and judgment thereon for the defendant, the case would have been different. *Partridge v. Gardner* evidently proceeds upon a mistaken notion of what was really decided in *Richmond v. Johnson*. Suppose there were one issue in fact, and fifteen demurrers, and the issue in fact were found for the defendant, and the plaintiff succeeded upon all the demurrers,—if the decision of the Court of Exchequer in *Partridge v. Gardner* be correct, the plaintiff would be entitled to no costs, unless there is a distinction in this respect between issues of fact and of law. There is nothing in the statute of Anne to warrant any such distinction; nor is there in principle any distinction between pleadings which are bad in law and those which are false in fact. The reasoning of the court in *Bird v. Higginson* has never been successfully impeached.

JERVIS, C. J.—I am of opinion that this rule must be made absolute. *313] If this case were wanting in *authority, it might have been necessary to enter more fully upon a consideration of the proper construction to be put upon the statute of Anne. But, for the purpose of

disposing of this rule, it strikes me that we may well abstain from that course,—though I will presently very briefly advert to the provisions of that statute. So far as concerns this court,—seeing how important it is to adhere to settled rules upon the construction of statutes relating to costs,—I think we are justified in adhering to the decision in *Clarke v. Allatt*, even though our so doing should have the effect of indirectly, or even directly, overruling a considered judgment of the Court of Exchequer; more especially as I cannot help thinking that that court would have hesitated to overrule the case of *Bird v. Higginson*, if their attention had been called to the fact that they were also overruling the case of *Clarke v. Allatt*. It is impossible to arrive at the conclusion we arrive at in this case, without seeing that we do in fact distinctly,—so far, at least, as this court is concerned,—overrule *Partridge v. Gardner* and *Howell v. Rodbard*: it will be necessary, therefore, to examine the authorities, as well as the statute itself upon which they profess to be founded, in order to see that we arrive at a right conclusion. It has been well observed by Mr. *Willes*, that the decisions in this court have been uniform and consistent. In *Yates v. Gun*,—which is, I believe, the earliest case upon the subject,—this court decided, that, under circumstances like those of the present case, the plaintiff was entitled to costs. And, in *Clarke v. Allatt*, they decided in accordance with that view. *Yates v. Gun* was followed by *Bird v. Higginson*, where the Court of Queen's Bench overruled a case of *Cooke v. Sayer*, a decision of their own court, which they deemed not satisfactory. I was concerned in *Bird v. Higginson*,* and I know that the greatest [*314 attention was paid to the case by LITTLEDALE, J., by whom the judgment was prepared. *Richmond v. Johnson*, and a similar case of *Hovard v. Cheshire*, Say. Rep. 260, were there treated by the court as wholly inapplicable to the question before them: those cases decided, that, where a plaintiff is entitled to judgment upon the whole record, but, by reason of some collateral matter, such judgment gives him no costs, he is not entitled to costs under the statute of Anne. I think the case of *Richmond v. Johnson* does not bear the construction which the Court of Exchequer have put upon it. They say that the conclusion drawn in *Bird v. Higginson* is not warranted by the cases, and is opposed to the established construction of the statute of Anne; and that, according to that construction, a plaintiff is not (under the statute of Anne) entitled to the costs of issues in fact found for him, unless some issue in fact has been found for the defendant also. It seems to me that that argument received the correct answer, in what fell from my brother WILLIAMS in the course of this discussion. If the statute of Anne is applicable only to cases where the plaintiff independently of that statute would get no costs, it follows that the plaintiff in the case of *Richmond v. Johnson* could not have been entitled to costs under it; because, he had his judgment upon all the issues, and consequently

would have had his costs, but for the certificate which deprived him of the benefit of the statute of Gloucester. That clearly shows that *Richmond v. Johnson* has no bearing whatever upon the cases of *Partridge v. Gardner* and *Howell v. Rodbard*. And there is nothing in the statute that is inconsistent with this view. The 4th section enacts that it shall *315] be lawful for any defendant *or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence. And, to prevent a multiplicity of frivolous pleas, the fifth section provides, "that, if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or, if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue, shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him." In other words, a defendant who chooses to plead frivolous pleas, must pay the costs occasioned by his so doing, even though he has judgment on other issues, which go to the whole cause of action. For these reasons, it seems to me that the true construction of the statute of Anne well warrants the decision in *Bird v. Higginson* and *Clarke v. Allatt*; and that the cases upon which the Court of Exchequer rely in *Partridge v. Gardner* and *Howell v. Rodbard*, do not justify the conclusion they there came to. Upon principle, therefore, as well as upon authority, I think we do no violence to the statute in making the rule to review the taxation in this case absolute.

WILLIAMS, J.—I am of the same opinion. The case of *Bird v. Higginson* was very fully considered: and it seems to me that the decision which the Court of Queen's Bench there came to, was one which was alike called for by good sense and propriety, and justified by the words of the statute of Anne; and it was deliberately recognised and acted *316] upon by this court in *Clarke v. Allatt*. Since then, the Court of Exchequer, in two cases, without, it seems, having had their attention called to *Clarke v. Allatt*, have overruled the decision of the Queen's Bench in *Bird v. Higginson*. The question now is, whether we ought to be induced to abandon the view adopted by us in *Clarke v. Allatt*. I, for one, should not for a moment have hesitated to do so, if I felt that the Court of Exchequer, in the cases referred to, viz. *Partridge v. Gardner*, and *Howell v. Rodbard*, had pointed out any fallacy in the reasoning which led the Court of Queen's Bench to the conclusion they came to in *Bird v. Higginson*, or any passage in the statute of Anne which they had inadvertently overlooked. But, to my mind, the judgments in *Partridge v. Gardner* and *Howell v. Rodbard* present no reason at all why we should not adhere to the consistent authorities of the Court of Queen's Bench and this court.

TALFOURD, J.—I am of the same opinion. The suggestion thrown out by my brother WILLIAMS in the course of the argument, satisfies me that every word of the statute of Anne will be given effect to, by holding it to apply to all cases where there has been double pleading,—whether the plaintiff does or does not fail upon any issue of fact. It seems to me to be quite obvious that the conclusion to which the Court of Exchequer came in the two cases to which we are called upon to subscribe, is one which never could have been contemplated by the legislature, and that there are no words in the statute that necessarily require such a construction. With the greatest respect, which we must at all times feel for a considered judgment of the Court of Exchequer, I think the reasons they have assigned for overturning the case of *Bird v. Higginson* are not *atisfactory, and therefore that we are bound to adhere [*317 to the uniform decisions of this court, which accord with the view taken by the Court of Queen's Bench in that case.

Rule absolute.(a)

(a) The ground upon which the Court of Exchequer proceeded in *Partridge v. Gardner* and *Howell v. Rodbard*, was, that they considered that the plaintiff ought not to have any costs under the statute of Anne, where the result shows that he never had any cause of action. *Partridge v. Gardner* afterwards came by writ of error before the Exchequer Chamber. All the cases, including *Clarke v. Allatt* and the principal case (*Callander v. Howard*), were referred to in argument: and the judgment of the Court of Exchequer was affirmed; Lord CAMPBELL, C. J., saying,—“*Mr. Phipson* has not cited any case in which the plaintiff has had his costs allowed him where the declaration has been hold bad. When judgment is arrested, the plaintiff does not get his costs; but each party bears his own. The statute of Anne seems to proceed upon the supposition that there is a good cause of action disclosed in the declaration, and that, *where there is none, the plaintiff shall not get his costs*. We are, therefore, of opinion, that the plaintiff is not entitled to the costs of those issues which have been found for him, and that the judgment of the court below is right, and must be affirmed.”

*OWEN v. VAN USTER. Nov. 15.

[*318

Held, that one who individually accepts a bill addressed to a firm of which he is a member, is individually liable thereon.

A bill was addressed to “The Allty-Crib Mining Company,” and accepted by the defendant, as follows,—“*Per proc.* The Allty-Crib Mining Company, W. T. Van U., London Manager.” It was proved that four persons, one of whom was the defendant, had agreed to work a mine, under the name of The Allty-Crib Mining Company, and had for some time worked it accordingly; and that the bill in question had been accepted by the defendant without the authority of his copartners:—Held, that the defendant was liable upon the bill, as acceptor. (Vide post, 326 (a).)

ASSUMPSIT on a bill of exchange. The declaration stated that the plaintiff, on the 26th of April, 1850, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of him, the plaintiff, in London, 100*l.*, three months after the date thereof, and that the defendant accepted the said bill of exchange, but did not pay the same when it became due, &c.

The defendant pleaded that he did not accept the said bill; whereupon issue was joined.

At the trial, before CRESSWELL, J., at the first sitting in London in the present term, it appeared that the bill was directed to "The Allty-Crib Mining Company, near Talybout, Aberystwith," and was accepted, "*Per proc.* The Allty-Crib Mining Company, payable at Messrs. Williams, Deacon, & Co.'s, W. T. Van Uster, London Manager."

It was proved that The Allty-Crib Mining Company consisted of four persons, of whom the defendant was one, who had, in the year 1849, agreed to form themselves into an association, under that name, for the purpose of working a mine, and that they had proceeded to work the mine accordingly; and one of the other shareholders, who was called as a witness, stated that he had never authorized the defendant to accept the bill in question, or any other, for the purposes of the company.

*319] *On the part of the defendant, it was submitted, on the authority of the case of *Leadbitter v. Farrow*, 5 M. & Selw. 345, that the defendant was not liable upon the bare acceptance; and that he was not liable upon the bill as a shareholder in the company, the plaintiff's own witness having proved that the acceptance was not authorized by the company. It was further contended, upon the authority of *Vice v. Lady Anson*, 7 B. & C. 409 (E. C. L. R. vol. 14), 1 M. & R. 113 (E. C. L. R. vol. 17), that there was no evidence to go to the jury to show that a company had been formed.

The learned judge, intimating some doubt as to whether there was not a variance, asked the plaintiff's counsel if he would amend; which the latter declined. His lordship then told the jury that the only question for them was, whether or not the defendant accepted the bill. The jury found he did, and accordingly returned a verdict for the plaintiff, damages 101*l.* 9*s.*

Kingdon now moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. It having been conceded at the trial, that the defendant was not chargeable upon an acceptance "*per procuration*," it is equally clear that he could not be liable, *upon the bill*, as a shareholder in the supposed company, the plaintiff's own witness having stated that the acceptance was not authorized by the other members of the company. [WILLIAMS, J.—Professing to act under an authority from his copartners, which in fact he had not, is not the defendant personally responsible?] Not upon the bill, which is not made according to the custom of merchants,—however he might, according to the doctrine laid down in *Polhill v. Walter*, 3 B. & Ad. 114 (E. C. L. R. vol. 23), have *rendered himself liable to a special action *320] upon the case. *Davis v. Clarke*, 6 Q. B. 16 (E. C. L. R. vol. 51), somewhat resembles this case. There, John Hart drew a bill payable to himself or order, addressed to John Hart: Clarke wrote across it—"Accepted, H. J. Clarke:" and it was held, that Clarke could not be sued as acceptor of a bill of exchange directed to him. Lord DENMAN there says: "There is no authority, either in the English law, or in the

general law-merchant, for holding a party to be liable as acceptor, upon a bill addressed to another.^(a) We must take it on this instrument, that the defendant is different from the party to whom it is addressed. Polhill v. Walter, and Jackson v. Hudson, 2 Camp. 447, are authorities showing that the defendant here cannot be sued as acceptor. In Jackson v. Hudson, Lord ELLENBOROUGH treated an acceptance by a party not addressed, as 'contrary to the usage and customs of merchants.'"
 [JERVIS, C. J.—Here the defendant is addressed.] Not individually. This point is incidentally touched upon by PARKE, B., in Ex parte Buckley, in re Clark, 14 M. & W. 469.† There, Messrs. J. C., R. M., J. P., and T. S., carrying on business as bankers, a promissory note in the following form was signed by R. M.:—"I promise to pay the bearer, on demand 5*l.*, value received"—"For J. C., R. M., J. P., and T. S."—"R. M.:" and it was held, that the holder of this note had not a separate right of action against the party so signing, but that the firm were liable. PARKE, J., in the course of the argument, observed—"He makes the promise as agent for the others, and for himself as principal. If he really had authority to subscribe the promise for all, they all are liable; but, if not, then he is personally liable,—at all events for misrepresentation." In Wilson v. *Barthrop, 2 M. & W. 863,† three persons carried on business as partners under the firm of J. B. & Son: two of the partners died, and the surviving partner employed the defendant, who had previously acted as clerk to the firm, to wind up the affairs: in this character, the defendant attended the warehouse, and transacted business with different parties, on account of the firm. Under these circumstances, the defendant, using and signing the name of the firm, drew upon J. H., a debtor to the firm, a bill of exchange, which J. H. accepted: it was held, that the defendant was not liable as the drawer, in an action *upon the bill*, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*: and a doubt was suggested, whether, if it had been proved that he had no such authority, he would have been liable in an action *upon the bill*. So, in Jenkins v. Hutchinson, 13 Q. B. 744 (E. C. L. R. vol. 66), which was an action of assumpsit on a contract alleged to have been made by the defendant, to charter a ship to the plaintiff,—upon proof that the defendant made a memorandum of charter-party in the name of one Barnes, and purporting to be signed by the defendant as agent for Barnes; that the defendant had no authority to contract for Barnes, and knew that he had none; and that Barnes refused to adopt the contract,—it was held, that the defendant was not liable as principal. Lord DENMAN, in delivering the judgment of the court, there says: ^(b) "In the absence of any direct authority, we think that a party

(a) Except in the case of an acceptance *enprâ protest*. 1 M. & R. 394, 395 (E. C. L. R. vol. 17).

(b) 13 Q. B. 752 (E. C. L. R. vol. 66).

who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name only as agent for that other, cannot be treated as a party to that instrument, and be sued *upon it*, unless it be shown that he was the *real* principal." In Buller's

*322] *Nisi Prius*, page 270, (a) it is said, that, "in the case of two joint traders, the acceptance of one will bind the other: but, if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him, and not the rest." That *dictum* somewhat *militates* against the argument. [MAULE, J.—When the bill is offered for acceptance, it is an inchoate contract. If the bill is addressed to four, and one contracts, why should he not be liable? (b) Does not proof of his entering into the contract satisfy the issue?] If this defendant had simply been manager, he clearly would not have been liable. [MAULE, J.—Suppose the bill had been drawn upon the four *nominatim*, and each separately had accepted it,—would not each have been liable? Would not the first have been liable the moment he put his name to the bill?] That is not exactly this case. In Beawes's *Lex Mercatoria*, vol. I. p. 595, § 228, it is said, that, "if a bill of exchange is drawn on two or more persons, in these terms,—'to Mr. A. B. and C. D., merchants, in London,' they ought both to accept the bill; for, the acceptance of only one is not complying with its tenor." In *Molloy, de Jure Maritimo*, book 2, c. 10, § 18, it is said, that "a bill drawn on two jointly must have a joint acceptance, otherwise it must be protested; but, to two, or *either* of them, *à contrà*. Then, if the same be accepted by one, it is pursuant to the tenor of the bill, and ought not to be protested but in case of non-payment; and, in that case, the person acceptor is liable to an action; but, if it be on joint traders, an *323] acceptance by one will conclude and *bind the other." [MAULE, J.—The latter part of the passage in *Molloy* is against you. Indeed, several of the authorities which you have very properly cited, satisfy me that, in principle, your position is not sustainable.]

Then, there was no sufficient evidence that the defendant was a shareholder. All that the witness stated, was, that he and the defendant and three other persons had, in 1849, agreed to form a company for the purpose of working the mine in question. There was no proof that a company had actually been formed, or that the individuals who so proposed to associate themselves together, had any interest in the mine. In *Vice v. Lady Anson*, 7 B. & C. 409 (E. C. L. R. vol. 14), 1 M. & R. 118 (E. C. L. R. vol. 17), in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money

(a) Citing *Pinkney v. Hall*, 1 Salk. 126.

(b) He does not accede to the proposal of the drawer. The drawer not having guaranteed payment by a single drawee, he would be discharged, unless the holder treated the bill as dishonoured. The drawer might say,—I drew upon A. and B., knowing the solvency of A.; but the holder, by taking the sole acceptance of B., has discharged A., and seeks to make me liable for the insolvency of B.

for certain shares, and received a certificate that she was a proprietor of those shares; and that she had acknowledged that she was a shareholder; but no assignment of any interest in the mine had been made to her,—it was held that the action could not be maintained. [MAULE, J.—That case proceeded upon the ground, not merely that Lady Anson had no interest in the mine, but that she was not in fact, though she had at one time thought she was, a shareholder; and that the plaintiff had not been induced by the supposition of her being a shareholder to trust the concern. Here, it appears, that four persons agreed to form a company, for the purpose of working a mine; and that a company was formed and the mine worked on that footing; and we find the defendant under his own hand acknowledging that he is acting as manager.] Suppose the four had agreed that certain formalities should be complied with before the company should be considered as formed, and those formalities had not *been complied with,—would the [*324 defendant then be liable? [MAULE, J.—That is supposing a case very different from this. It is not competent to this person, after his acceptance, to say that the company was not a completely formed company.]

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. The action is brought upon a bill of exchange addressed to certain persons who are described as “The Allty-Crib Mining Company,” and accepted by the defendant, on their behalf, describing himself as the London manager. Of course, the moment it appeared that the defendant had accepted the bill by procuration, he could not be held to be personally liable, without further evidence. The question, then, is, whether there was evidence to fix him with the acceptance, as a shareholder in the company. If there was no evidence that he was a person interested in the mine, he would not be liable. In *Vice v. Lady Anson*, the mine was not worked by or on behalf of Lady Anson, unless she was a shareholder in a company duly and completely formed: and the only evidence relied on to prove that she was, consisted of admissions made by her in error. Here, it appears from the form of the acceptance, that the defendant was the manager of the company; and it appeared from the other evidence in the cause, that four persons had, in the year 1849, agreed to form a company for the purpose of working this mine, and that it had been worked accordingly. It was, therefore, a question for the jury, whether or not the defendant was a member of the firm. They found that he was. Being, then, a member of the firm, the next question is, whether the acceptance by one member, in his own name, of a bill addressed to a firm composed of four, imposes any liability upon the individual who so accepts. It seems from the authorities,—and especially *from the passage cited from Molloy,— [*325 that, under such circumstances, the acceptance is binding upon

the individual so accepting. I think that is ample authority for us in this case.

MAULE, J.—I am of the same opinion. The cases have been very industriously sifted, and their result very accurately stated by the learned counsel. That result shows that an acceptance by one, of a bill of exchange addressed to four, renders the actual acceptor personally liable. And I do not think that the case is at all varied by the circumstance of his having falsely affirmed that he had authority to accept for the firm. Such misrepresentation might possibly give the plaintiff another sort of remedy against him: but it clearly does not deprive him of his direct remedy against him as the acceptor of the bill. With respect to the evidence of the defendant's being a shareholder,—it appears that a witness stated, that himself, the defendant, and two other persons, had in the year 1849 agreed to form themselves into a company for the purpose of working the mine in question, and that the mine had accordingly been worked by them under that agreement: and the defendant, in his acceptance, states that he is the London manager of The Allty-Crib Mining Company. That was ample evidence that those four individuals were jointly engaged in working the mine, and clearly fixed the defendant as one of the persons for whose benefit and on whose behalf the bill was accepted. In *Vice v. Lady Anson*, the defendant was held not to be liable, because she had no legal interest in the mine. The question arose in this way:—In order to make Lady Anson liable in respect of expenses incurred in working the mine, it was necessary to show that she was a person interested therein, and so one upon whose *326] behalf those expenses had been *incurred. The only evidence to show that she was interested in the mine, was, that she had in conversation stated that she was a shareholder in the concern. That was disposed of by showing that she made that statement under a misimpression. It was sought to be shown that she had a legal interest in the mine; but that failed. That case by no means shows that there is no way of proving a person to be a worker of a mine, except by showing that he has a legal interest in it: it only shows, that, if legal interest is the evidence relied on to establish a liability in respect of the working of the mine, that interest must be properly proved. It clearly was not necessary in this case to show that the defendant had any legal interest in this mine; for, it was distinctly proved that he was one of the persons on whose behalf the mine was being worked.

WILLIAMS, J.—I am of the same opinion. I think there was abundant evidence to show that the defendant was a member of The Allty-Crib Mining Company, and one of those to whom the bill in question was addressed; and, consequently, that he was liable upon his acceptance.

TALFOURD, J., concurred.

Rule refused.(a)

(a) Beawes impliedly, and Molloy expressly, draws the distinction between an acceptance by

one of two joint-drawers who are partners, and an acceptance by one of two joint-drawers who are not partners. In the former case, there being an implied authority arising out of the partnership relation, an acceptance by one is the acceptance of both: in the latter case, an acceptance by one would be void as against the drawer and as against all endorsers preceding the party who obtained, and acquiesced in, the defective acceptance. In the principal case, the adventurers were not partners, and the defendant had no authority to bind his co-adventurers.

A bill drawn on a firm, but not accepted till after a dissolution of the partnership, publicly announced, binds only the partner who accepts. *Tombekbee v. Dumell*, 5 Mason, 56.

***H. B. W. HILCOAT v. JOHN BIRD, Lord Archbishop of CANTERBURY, and THOMAS, Lord Archbishop of YORK. [*327**
June 24.

By an act for making a railway, the company were authorized to purchase the church of St. M., in Liverpool, and certain ground and buildings attached thereto, not forming part of the site of the church, but that nothing in the act contained should enable the company to take down or interfere with the said church or ground, without the consent in writing of the diocesan first obtained, upon the previous payment by the company to him and the Archbishop of York, for the time being, of such sum as should be agreed upon between the said archbishop and bishop and the company,—in ascertaining which sum, regard was to be had to the costs of a site for a new church, and of erecting and completing the same, and also to the value of such part of the premises as did not form the site of the church; and that, upon payment of the sum so to be agreed upon, the then present church, and the ground attached thereto not forming the site of the church, and the freehold and inheritance thereof, should vest in the company; and that the sum so paid to the archbishop and bishop should be employed by them, among other purposes, in making payment to the person entitled thereto of the value of the said ground and buildings not forming part of the site of the church.

The archbishop and bishop, having agreed with the company, offered the plaintiff, the incumbent of the church of St. M., and the person entitled to the ground and buildings not forming part of the site of the church, 300*l.* as the value of his interest therein,—upon the assumption, that, being consecrated ground, it was in his hands inapplicable to any secular purpose, and was therefore only worth that sum. The plaintiff thereupon brought an action upon the case against them.

The declaration, after setting forth the provision of the act above referred to, stated, that the plaintiff was entitled to the value of the land and premises not forming the site of the church; that it was afterwards agreed between the company and the defendants, that the sum of 7732*l.* 1*7s.* should be paid by the company to the defendants, as the sum upon the payment whereof the company were to be authorized to take possession of the said church and premises, and take down the church, with the consent of the diocesan; that the said sum was paid to the defendants, and thereupon the premises became and were vested in the company, and the bishop gave his consent accordingly; that the said sum was sufficient to purchase a site, and complete the new intended church, and also to pay the value of so much of the said ground and buildings as did not form the site of the church; and that the value of the said ground and buildings was 2000*l.*, which sum the defendants were requested to pay the plaintiff,—but which they refused to pay, and had not paid, although a reasonable time for so doing had elapsed.

At the trial, the judge told the jury that the plaintiff was not concluded as to the value of the ground and buildings so vested in him, and not forming part of the site of the church, by the determination of the archbishop and bishop under the act; and he left the question of value to them, telling them that they were not bound to estimate the value as of land irrevocably appropriated to spiritual uses:—

Held, that the jury were properly directed:

Held, also, that the declaration sufficiently disclosed the duty of the defendants under the statute, and that the breach was well alleged.

CASE. The first count of the declaration stated, that, by an act of parliament passed in the session of parliament holden at Westminster,

*328] in the 9th and *10th years of the reign of Her present Majesty, Queen Victoria, intituled "An act for amending the act relating to the Liverpool and Bury Railway, and for making branches therefrom," it was enacted, amongst other things, that nothing in the said act contained should enable the Liverpool and Bury Railway Company, in the said act mentioned, to take down or interfere with the church or chapel known as the chapel of St. Matthew, in the parish of Liverpool, for the proper performance of divine service therein, uninterrupted by noise or molestation on account of the works of the said company, or with the yard or ground attached thereto, and the buildings erected on part of the said ground, or with the passage to or from the said church or chapel, in Key Street, into and from Lumber Street, without the consent of the Lord Bishop of Chester for the time being, in writing, under his hand, first had and obtained, upon the previous payment by the said company to the said bishop and the Lord Archbishop of York for the time being, of such sum of money as should be agreed upon between the said archbishop and bishop and the said company,—in ascertaining which sum; regard should be had to the cost of a site of equal dimensions, for a new church, in such a situation within the said parish of Liverpool as should be approved of by the said archbishop and bishop, and of enclosing the

*329] *same with iron railings or other proper enclosure, and of erecting and completing in all respects a new church thereon, capable of accommodating seven hundred and thirty persons at the least, and fitting up the same with furniture, gas-fittings, stoves, organ, and all other things necessary for the performance of divine service therein, together with the expenses of consecrating the said church; and that regard should be had also to the value of such part of the said premises, and buildings thereon, as did not form the site of the then present church or chapel; and likewise, if the said archbishop and bishop should so think fit, to the purchase, for the benefit of the incumbent of the said new intended church, of all estate, right, title, and interest which any person or corporation then had, or was or were entitled to, in any of the pews or seats in the then present church or chapel, beyond the annual sum of 95*l.* reserved thereout for the minister, clerk, and sexton; and also that, on payment by the said company to the said archbishop and bishop, of the sum so to be agreed upon, the said then present church or chapel, together with the site thereof, and the whole of the said yard or ground, buildings, and passage, and the freehold and inheritance thereof, should vest in the said company; and the sum so paid to the said archbishop and bishop should be employed by them in purchasing and enclosing the site for the said new intended church, and in erecting, completing, and fitting up the same in manner aforesaid, and in defraying the expenses of consecration, and in making payment to the person or corporation entitled thereto, of the value of so much of the said ground as did not form the site of the then present church or chapel, and of the build-

ings on that part of the said ground, and of the purchase-money of all estate, right, title, and interest which any person or corporation then had, or was or were entitled to, in any of the pews or seats in [330
 *the then present church or chapel, beyond the said annual sum of 95*l.*, in case the said archbishop and bishop should think fit that the same should be purchased, in manner aforesaid: That afterwards, and before the making of the agreement thereafter mentioned, and before the payment of the sum of money thereafter mentioned, and before the giving of the consent thereafter mentioned, by a certain act of parliament made and passed in the 9 & 10 Vict., for incorporating the said Liverpool and Bury Railway Company with the Manchester and Leeds Railway Company, the said Liverpool and Bury Railway Company were amalgamated with, and their undertaking, powers, and authorities became vested in, the Manchester and Leeds Railway Company: That, afterwards, and before the making of the agreement thereafter mentioned, and before the payment of the sum of money as thereafter mentioned, and before the giving of the consent thereafter mentioned, by a certain act of parliament made and passed in the 10 & 11 Vict., for enabling the said Manchester and Leeds Railway Company to make certain branches, extensions, and other works, and to alter the name of the said company,—it was enacted, amongst other things, that, from and after the then present session of parliament, the said Manchester and Leeds Railway Company should no longer be called by the name of the Manchester and Leeds Railway Company, but that the same company should be called and known, and continue to be incorporated, and have continuance, by the name of the Lancashire and Yorkshire Railway Company: That, at the time of the passing of the said first-mentioned act of parliament, the said passage and part of the said ground in the said first-mentioned act of parliament mentioned, and certain buildings then erected and being on that part of the said ground, did not form the site of the said then present church or chapel known as the [331
 *chapel of St. Matthew in the said first-mentioned act of parliament mentioned, or any part of such site: That, at the time of the passing of the said first-mentioned act, and from thence to the time of pleading, the plaintiff was, and continued to be, the person entitled to the value of the said passage, and of the said part of the said last-mentioned ground so not forming the site of the said then present church or chapel, and of the said buildings so on that part of the said ground as aforesaid, within the true intent and meaning of the said first-mentioned act: That, after the passing of the said several acts, and before the commencement of this suit, to wit, on the 3d of March, 1848,—the defendants then being respectively the said Bishop of Chester for the time then being, and the said Archbishop of York for the time then being,—it was agreed between the said Lancashire and Yorkshire Railway Company, and the defendants, so then respectively being the Archbishop of

York and Bishop of Chester for the time then being, that a certain sum of money, to wit, 7782*l.* 17*s.*, should be paid by the said last-mentioned company to the defendants, so then being respectively Archbishop of York and Bishop of Chester for the time then being, as the sum of money upon the previous payment whereof by the said company to them the defendants, so then being respectively Archbishop of York and Bishop of Chester for the time being, the said company were to be authorized and enabled to take down or interfere with the said church or chapel in the said first-mentioned act of parliament mentioned, and therein described as the church or chapel known as the chapel of St. Matthew, in the parish of Liverpool, or the proper performance of divine service therein, or with the yard or ground attached thereto, and the buildings erected on part of the said ground, or with the passage to and from the said church or chapel in Key Street, into and from Lumber Street, with the consent of the said Lord *Bishop of Chester

*332] for the time being, in writing, under his hand first had and obtained: That the said sum, to wit, 7732*l.* 17*s.*, then was, in pursuance of the said agreement, paid by the said Lancashire and Yorkshire Railway Company to the defendants, so then being respectively the said Bishop of Chester and Archbishop of York for the time then being; and upon such payment of the said sum so agreed upon as aforesaid, the said church or chapel known as the chapel of St. Matthew, in the said first-mentioned act of parliament mentioned, together with the site thereof, and the whole of the said yard or ground, buildings, and passage in the said first-mentioned act of parliament mentioned, and the freehold and inheritance thereof, became and were vested in the said Lancashire and Yorkshire Railway Company, pursuant to the said act of parliament; and thereupon, and upon the said payment to the said defendant of the said sum so agreed upon, the said defendant the Archbishop of Canterbury, then being the said Bishop of Chester for the time being, then gave such his consent in writing, under his hand, as in the said first-mentioned act of parliament mentioned as aforesaid,—of all which the defendants then, and before the commencement of this suit, had notice: That the said sum, to wit, of 7732*l.* 17*s.* so agreed upon and paid to the defendants as aforesaid, at the time when the said sum was so agreed upon and paid as aforesaid, and from thence hitherto, had been and was sufficient to purchase and enclose the site for the said new intended church in the said first-mentioned act of parliament mentioned, and to erect, complete, and fit up the same with furniture, gas-fittings, stoves, organ, and all other things necessary for the performance of divine service, and also to defray the expenses of consecrating the said church, and also to pay the plaintiff, so being the person entitled thereto, the

*333] value of so much of the said ground in the said *first-mentioned act of parliament mentioned as aforesaid, as did not form the site of the then present church or chapel in the said first-mentioned act men-

tioned, known as the chapel of St. Matthew, in the parish of Liverpool, and of the buildings on that part of the said ground: That the value of so much of the said ground in the said first-mentioned act of parliament mentioned, as at the time of the passing of the said first-mentioned act of parliament, did not form the site of the said then present church or chapel in the said first-mentioned act of parliament mentioned, and of the said buildings so on that part of the said last-mentioned ground as aforesaid, during all the time aforesaid, amounted, and still amounts, to a large sum of money, to wit, the sum of 2000*l.*, of all which the defendants afterwards, and before the commencement of this suit, and before the said 8d of March, 1848, and before the said agreement, to wit, on the 1st of March, 1848, had notice; and the defendants were afterwards, and before the commencement of this suit, to wit, on the 10th of April, 1848, requested by the plaintiff to pay him such value as aforesaid; yet the defendants, not regarding their said duty in that behalf, contrary to the form of the statute in such case made and provided, did not nor would, when thereunto required, or at any time, pay to the plaintiff the value of so much of the said last-mentioned ground as did not, at the time of the passing of the said first-mentioned act, form the site of the then present church or chapel in the said first-mentioned act of parliament mentioned, and of the said buildings on that part of the said ground as aforesaid, or any part of such value, although a reasonable time for the payment thereof had elapsed after the defendants were so requested to pay the same as aforesaid, and before the commencement of this suit; but that the defendants had wholly neglected and refused so to do, and the same remained *wholly unpaid to the plaintiff, contrary to [*384 the form of the statutes in such case made and provided.

There was a second count, which, upon the argument, was abandoned, it being agreed that the jury should be discharged from finding any verdict on the issues joined upon the pleas to that count.

To the first count, the defendants pleaded,—first, not guilty:

Secondly, that the said passage and the whole of the said ground in the first-mentioned act of parliament mentioned, and of the said buildings then erected and being on the said ground, did form part of the site of the then present church or chapel known as the chapel of St. Matthew, in the first-mentioned act of parliament mentioned:

Thirdly, that the plaintiff was not, at the time in the said first count in that behalf mentioned, nor had been, nor was, the person entitled to the value of the said passage and of the said part of the said ground so not forming the site of the said church or chapel, and of the said buildings so on that part of the said ground, as in the declaration mentioned, or of any of them, or of any part thereof, in manner and form as in the declaration was alleged:

Fourthly, that it was not agreed between the said Lancashire and

Yorkshire Railway Company and the defendants, in manner and form as the plaintiff had above in the first count in that behalf alleged.

Fifthly, that the said sum of money in the first count mentioned, was not paid by the said Lancashire and Yorkshire Railway Company to the defendants, nor did the defendant, the Archbishop of Canterbury, then being the Bishop of Chester for the time being, give such his consent in writing under his hand, as in the first-mentioned act of parliament mentioned, in manner *and form as in the said first count of the declaration alleged.

Upon these pleas issues were joined. There was also a sixth plea, to the first count, but that was abandoned by the defendant on the argument.

The cause was tried before WILDE, C. J., at the sittings in London after Michaelmas term, 1849, when a verdict was found for the plaintiff, damages 1540*l*.

A rule was obtained, on the part of the defendants, in the following term, calling upon the plaintiff to show cause why the verdict for the plaintiff, on the first, second, and seventh issues should not be set aside, and a verdict entered for the defendants on those issues, pursuant to leave reserved for that purpose; or why the judgment should not be arrested; or why there should not be a new trial, upon the ground of misdirection, the improper reception of evidence, and that the verdict was against evidence.

Byles, Serjt., and *Peacock*, showed cause, in Easter term last.—They referred to the 10th and 11th sections of the 9 & 10 Vict. c. cccxii., and cited the following cases, viz. *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962 (E. C. L. R. vol. 10), 7 D. & R. 376 (E. C. L. R. vol. 16), *Franklum v. The Earl of Falmouth*, 2 Ad. & E. 452 (E. C. L. R. vol. 29), 4 N. & M. 330 (E. C. L. R. vol. 30), *Carden v. The General Cemetery Company*, 5 N. C. 253, 7 Scott, 97, *Cane v. Chapman*, 5 Ad. & E. 647 (E. C. L. R. vol. 31), 1 N. & P. 104 (E. C. L. R. vol. 36), and *The Queen v. The Hull and Selby Railway Company*, 6 Q. B. 70 (E. C. L. R. vol. 51).

Sir *F. Thesiger*, and *Tomlinson*, in support of the rule, referred to *Wills v. Maccarmick*, 2 Wils. 148, and *Jones v. Ellis*, 2 Y. & J. 265.†

*336] *The facts, and the arguments in support of and against the rule, are so fully stated in the judgment,—which was prepared by WILDE, C. J.,—that it is thought unnecessary to insert them at length. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court.

This case came before the court upon a rule obtained, on the part of the defendants, calling upon the plaintiff to show cause why the verdict which had been found for the plaintiff upon the issues joined upon the first, second, and seventh pleas, should not be set aside, and a verdict entered for the defendants on those issues, pursuant to leave reserved

for that purpose,—or why the judgment should not be arrested,—or why there should not be a new trial, upon the ground of misdirection, and upon the ground that inadmissible evidence had been received, and also that the verdict was against the evidence.

The declaration was in case, and consisted of two counts. The first count referred to an act of parliament made and passed in the 9th and 10th years of the reign of Victoria, intituled “An act for amending the act relating to The Liverpool and Bury Railway, and for making branches therefrom,” by which The Lancashire and Yorkshire Railway Company were authorized to become the purchasers, under the circumstances therein mentioned, of the church or chapel of St. Matthew, in the parish of Liverpool, and of certain ground and buildings attached thereto, not forming part of the site of the said church or chapel.

The declaration set forth, that by the said act, the company were not to interfere with the said church, chapel, or ground, without the consent in writing of the Bishop of Chester for the time being, obtained upon *the previous payment by the company to the said bishop [*387 and the Archbishop of York for the time being, of such sum of money as should be agreed upon between the said archbishop and bishop and the said company; in ascertaining which sum, regard was to be had to the cost of a site for a new church, and of erecting and completing the same with all things necessary for the performance of divine service, and also to the value of such part of the said premises as did not form the site of the church or chapel, and likewise, if the archbishop and bishop should so think fit, to the purchase for the benefit of the incumbent of the new church, of all the right and interest which any person should be entitled to in the pews or seats of the then present church or chapel, beyond the annual sum of 95*l.* reserved thereout; and that, upon payment of the sum so to be agreed upon, the said then present church or chapel, and the ground attached thereto, not forming the site of the church, and the freehold and inheritance thereof, should vest in the said company; and the sum so paid to the archbishop and bishop should be employed by them among other the purposes therein mentioned, in making payment to the person entitled thereto, of the value of the said ground and buildings not forming part of the site of the church or chapel, and, in case the archbishop and bishop should think fit, in the purchase of the right and interest to which any person was entitled in the pews or seats of the church beyond the annual sum of 95*l.* The declaration then averred, that the plaintiff was entitled to the value of the land and premises not forming the site of the said church; that it was afterwards agreed between the said company and the defendant, that the sum of 7782*l.* 17*s.* should be paid by the company to the defendants, as the sum upon the previous payment whereof the company were to be authorized to take possession of the said church *and premises, and take the [*388 said church down, with the consent of the Bishop of Chester, in

writing, first had and obtained; that the said sum was paid accordingly to the defendants, and, upon such payment, the said premises became and were vested in the said company, pursuant to the said act of parliament; and that thereupon the said Bishop of Chester gave his consent in writing accordingly; and that the said sum was sufficient to purchase, complete, and fit the said new intended church with all things necessary for the performance of divine service therein, and also to pay the value of so much of the said ground and buildings as did not form the site of the church. The declaration then averred the value of the said ground and buildings to be of a certain specified amount, of which the defendants had notice, and which they were requested to pay to the plaintiff; and that the said Bishop of Chester had since become Archbishop of Canterbury. It then alleged a breach of duty on the part of the defendants, in not having paid to the plaintiff the value, or any part thereof, of the said ground and buildings which did not form part of the site of the church, although a reasonable time for that purpose had elapsed.

There was a second count in the declaration, which, or the pleas thereto, it will not be necessary to notice, because, in the course of the argument upon the rule, it was agreed by the parties that the plaintiff should abandon the second count, and that the defendants should abandon the sixth plea to the first count, and that the jury should be discharged from finding any verdict upon the issues joined upon the pleas to the second count, and upon the issue joined upon the sixth plea to the first count.

To the first count, the defendants pleaded,—first, not guilty,—secondly, that the ground and buildings before referred to, formed part of the site of the church,*—thirdly, that the plaintiff was not entitled to *339] the value of the said ground and buildings,—fourthly, that no such agreement as alleged had been made between the company and the defendants,—fifthly, that the alleged sum of money had not been paid by the company to the defendants, and that the Archbishop of Canterbury, then being Bishop of Chester, did not give the consent in writing, as alleged in the declaration.

The issues joined on the five pleas to the first count in the declaration, were tried by a special jury, before the lord chief justice, at the sittings in London after last Michaelmas term, when verdicts on each of these issues were found for the plaintiff, with damages to the amount of 1540*l*.

Cause was shown against the before-mentioned rule, and the case was argued, in Easter term last. The main point, if not the only point discussed upon the argument of the rule, was, the true construction of the 10th and 11th sections of the statute before mentioned. It is therefore necessary to advert particularly to those sections.

By s. 10, it is provided that nothing in the act contained should enable the company to take down or interfere with the church or chapel

before mentioned, or the proper performance of divine service therein, uninterrupted by noise or molestation, or with the yard or ground attached thereto, and the buildings erected on part of the said ground, or with the passage to and from the said church or chapel in Key Street into and from Lumber Street, without the consent of the lord Bishop of Chester, in writing under his hand, first had and obtained, upon the previous payment by the said company to the said bishop and the lord Archbishop of York of such sum of money as should be agreed upon between the said archbishop and bishop and the said company,— [*840 in ascertaining which sum, regard should *be had to the cost of a site of equal dimensions for a new church, and of enclosing the same, and of completing a new church in all respects, capable of accommodating seven hundred and thirty persons at the least, and fitting up and furnishing the same with all things necessary for the performance of divine service therein; and regard should also be had to the value of such part of the said ground and buildings thereon as did not form the site of the said church or chapel, and likewise, if the said archbishop and bishop should so think fit, to the purchase for the benefit of the incumbent of the new church, of all right and interest which any person then had in any of the pews or seats in the then present church or chapel, beyond the annual sum of 95*l.* reserved thereout for the minister, clerk, and sexton.

And by the 11th section it was enacted, that, on payment to the archbishop and bishop of the sum to be agreed upon, the church or chapel, with the site thereof, and the said yard, ground, buildings, and passage, and the freehold and inheritance thereof, should vest in the said company, and the sum so paid should be employed by the defendants for the purposes mentioned in the 10th section, and in making payment to the person entitled thereto of the value of so much of the said ground as did not form the site of the said church or chapel, and of the buildings on that part of the said ground, and of the purchase-money of the estate and interest which any person had, or was entitled to, in the pews or seats of the said church or chapel, beyond the said annual sum of 95*l.*, in case the archbishop and bishop should think fit that the purchase should be made.

By the evidence given at the trial, it appeared that the defendants had entered upon the inquiry as to the value of the ground and buildings in dispute, and that the plaintiff had claimed and insisted before them that *such ground and buildings were of the value of a sum [*841 exceeding 1500*l.*; while, on the part of the company, it was insisted that the value was much less than the amount claimed by the plaintiff: and it was contended, on their behalf, that, as the ground and buildings had been consecrated and appropriated to spiritual uses, the plaintiff could never have applied it to any other purpose, or, at all events, that only a small part could have been so applied; and that the

pecuniary value to the plaintiff should be estimated with reference to such irrevocable appropriation, and was consequently very small, and did not exceed the sum of 800*l*.

It also appeared that the Archbishop of Canterbury, as the then Bishop of Chester, had afterwards given his consent, as required by the act of parliament, to authorize the company to take possession of the church and other premises, upon payment being made to the defendants of the sum of 7782*l*. 17*s*., and the company indemnifying the defendants against the claim of the plaintiff; and that the company had accordingly taken down the church, and appropriated the whole of the premises to the purposes of the act of parliament. It also appeared that the defendants had repeatedly professed themselves ready to pay the plaintiff the amount which they had determined to be the value of the said ground and buildings not forming part of the site of the said church or chapel, and of the amount of his interest in the surplus pew-rents, provided the plaintiff would execute a conveyance or assignment of such his interest in the surplus pew-rents, and give a discharge for the payment of the value of the said ground and buildings; but that the plaintiff had refused to accept such sum upon the terms proposed.

Evidence was also given, on the part of the plaintiff, that the said *342] ground and buildings, to be applied to the *ordinary purposes for which they would be fit, were of the value of 1540*l*.

Upon the part of the defendants, no witnesses were called: and it was contended that the jury ought to be directed to find for the defendants upon the issue of not guilty, upon the ground that the defendants were by the act of parliament constituted arbitrators and judges conclusively to determine upon the question of value; and that, as they had determined the amount of such value, and had offered to pay the same to the plaintiff, the wrongful breach of duty charged in the first count of the declaration was not proved, and the defendants were therefore entitled to a verdict.

It was further contended that the evidence on the part of the plaintiff, as to the value, was inadmissible, and ought not to be submitted to the jury, but the jury ought to be directed that the determination of the defendants as to the value was conclusive, and that in no event the verdict ought to exceed the amount so determined to be the value by the defendants: but, further, that, even supposing the plaintiff was not concluded by the defendants' determination of the value, yet that the jury ought to be directed to estimate the value as for ground and buildings irrevocably appropriated to spiritual uses, from which the plaintiff could not divert them, or, at least, only a very small part, and, except as to that part, would derive no pecuniary profit.

The lord chief justice declined to direct a verdict for the defendants upon the issue of not guilty, and directed the jury that the plaintiff was not bound and concluded, as to the value, by the defendants' determina-

tion; and he also declined to direct the jury that they were bound to estimate the value as for land irrevocably appropriated to spiritual uses, and which had no other *pecuniary value to the plaintiff; but he left it to the jury to estimate the value with reference to all the [*343 circumstances, as they appeared in evidence before them,—leaving the question of value entirely to their judgment.

The evidence upon the other issues was also left to the jury, with a direction, that, if the defendants had declined to pay the value of the said ground and buildings to the plaintiff, the plaintiff was entitled to the verdict upon the issue of not guilty.

The jury found a verdict for the plaintiff, damages 1540*l.*, and also found verdicts for the plaintiff on the other issues.

Upon the argument in support of the rule, the questions raised at nisi prius were again brought forward; that is to say, it was contended,—first, that the defendants were constituted and appointed arbitrators or judges, with power and authority to determine the value conclusively, as between the plaintiff and the company, of the ground and buildings not forming part of the site of the church or chapel, and that the jury ought to have been so directed,—secondly, that the jury ought to have been directed to estimate the value to the plaintiff of such ground and buildings, as being irrevocably consecrated and bound to spiritual uses, and incapable by the plaintiff of any other application.

We have considered the arguments which have been addressed to us on these questions; and we are of opinion, that, upon the true construction of the statute, the defendants were not constituted and appointed arbitrators and judges to determine conclusively upon the value of the property for which the plaintiff was entitled to be paid.

The language of the statute does not warrant any such construction. The defendants were authorized to agree with the company as to the amount to be paid, *with reference to all the objects which the defendants were empowered to accomplish; and they had an [*344 unfettered discretion in regard to the amount which they should require to be paid, with very specific directions as to the sums which they would have to pay and disburse out of the amount which they should agree to accept.

By section 10, they are directed to have regard to the sum which would be required for the purchase of a site, of a certain size, for a new church, for completing the church, and fitting up the same in all respects for the performance of divine service therein, and also to have regard to the value of such part of the ground and buildings thereon as did not form the site of the existing church; and likewise, if the defendants should think fit, to the cost of purchasing the surplus pews: and they were by section 11 distinctly charged with the duty of employing the money which they should accept from the company, among other purposes mentioned, in making payment of the value of so

much of the said ground and buildings [as did not form part of the site of the said church.](a)

The duty of the defendants, therefore, was most distinctly marked out, with ample means of performing it: and, as they had unrestrained power to vest the property of the plaintiff in the company, against the consent of the plaintiff, they were bound, before they divested such property from the plaintiff, to put themselves in a situation to compensate him according to the terms of the act of parliament. Neither of the sections contains any expressions whatever importing any power upon their part to bind the plaintiff as the owner. They were under no obligation to give him any notice of their proceedings, or to consult, *845] or even *to hear him; nor had he any power of calling witnesses before them, or of interfering in any manner in their negotiation with the company, or decision: and the only protection or security given to the owner, is, the imposition of the duty and obligation upon the defendants, before they deprived the plaintiff of his property by vesting it in the company, to put themselves in the condition of being provided with the means of paying him the value of the property which they had taken from him and vested in the company.

The mode they have adopted for their own security, appeared by the evidence, as before stated, to be, the taking an indemnity from the company against the claim of the plaintiff: thus making the company the real defendants in the cause; who, it also appeared, had the conduct of the defence.

The court consider the duty of the defendants to be plainly expressed in the act of parliament; and that the evidence shows that they have committed the breach of that duty which is complained of in the first count of the declaration, in having omitted or refused to pay to the plaintiff the value, as found by the jury, of the ground and buildings before referred to; that the verdict, therefore, on the issue of not guilty has been properly found for the plaintiff; and that there is no ground to disturb such verdict: and, further, that the duty so imposed upon the defendants, and the breach of it which they are charged with committing, is sufficiently stated in the first count of the declaration; and that there is no ground for arresting the judgment.

The second point made by the defendants, in support of the rule, was, that the jury had been misdirected upon the question of the amount of the damages, and that the verdict was against the evidence,—upon which latter grounds, a new trial was asked for.

*846] *The objection that the verdict was against evidence, has been disposed of in considering the validity of the first count of the declaration; inasmuch as that objection depended upon the question whether the jury ought to have treated the determination of the defend-

(a). The words contained between the brackets are struck through in the original judgment—apparently by accident.

ants as to the amount of the value, as conclusive,—upon which the opinion of the court has been already expressed.

The alleged misdirection consisted in the jury being told that they were not bound to estimate the value of the ground and buildings for which plaintiff was entitled to be paid, as land irrevocably appropriated to spiritual purposes, of which the plaintiff could make no pecuniary advantage, but that it was competent to them to form their estimate of the value, with reference to all the circumstances that had appeared in evidence before them, and the question being left upon the evidence in the cause to the unfettered judgment of the jury. The court is of opinion that there was no misdirection in thus submitting the question of damage to the jury.

The question of value was clearly for the jury; and it may not be very plain by what precise rule or test the value should be estimated. The owner is to be paid the value. That enactment is unaccompanied by any words of qualification or restriction: and there seems no reason for construing the words in any other than their ordinary sense and meaning.

The act of parliament passed for the purpose of withdrawing the church, ground, and buildings from the spiritual appropriation, and applying them to secular uses; and, in connexion with that determination, the duty was imposed of paying the owner the value of the ground and buildings not forming the site of the church: and, in the absence of any peculiar rule being prescribed for ascertaining such value, it is *reasonable to infer that the value was to be ascertained in relation to the nature and situation of the property generally, and [*347 its applicability to ordinary purposes, discharged of any prescribed appropriation. If the company had thought they had any claim to take land to be used by them for secular purposes, but that the owner was to be paid only the value estimated upon the footing of its being irrevocably appropriated to spiritual purposes, they ought to have asked parliament for a distinct enactment to that effect; when the parties would have been heard upon it. But, having obtained the power to take the property discharged of its spiritual appropriation, and to apply it to secular purposes, connected with pecuniary profit, upon the terms of paying the value generally, the right to insist upon having such value estimated by some peculiar and restricted test, is by no means obvious.

By the appropriation of property to ecclesiastical or spiritual purposes, the owner voluntarily sacrifices the pecuniary value of the property so appropriated: but he makes that sacrifice to obtain an object which he estimates of greater value than pecuniary value. But, when that object is entirely withdrawn from him, by the application of the property, against his will, to secular uses, and those uses connected with pecuniary profit,—it does not seem consistent with justice to estimate the value to

the owner upon the footing of its irrevocable appropriation to those spiritual purposes from which it has been already withdrawn.

The several grounds, therefore, upon which it has been attempted to support the rule, having failed, the rule must be discharged.

Rule discharged.

*348] ***HANCOCK and Another v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.**

The declaration stated that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides,—that the anchor had become removed into, and remained in, another part of the river covered by ordinary tides, not indicated, whereof the defendants had notice, and although they had the means and power of refixing and securing the anchor, and indicating it, they neglected so to do, whereby the plaintiffs' vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged, &c.—Held bad, on demurrer, for not showing that the defendants were privy to the removal of the anchor, or that it was their duty to refix it and to indicate it.

CASE. The declaration stated, that the plaintiffs, before and at the time of the committing of the grievance by the defendants as thereafter next mentioned, were lawfully possessed of a certain ship or vessel, to wit, of the value of 3000*l.*, laden with coal, to a large amount, to wit, 2000*l.*, then lawfully being in the river Tyne, the same being a public navigable river; that the defendants, before and at the time of the committing of the said grievance, were possessed of a certain anchor, called a mooring anchor; that, before the committing of the grievance thereafter mentioned, the said anchor had been placed and fixed in the soil of the said river, and there ordinarily remained, at and on a certain known part thereof, wherein the said anchor would be covered by ordinary tides, and would be then invisible; that, before the committing of the said grievance, the said anchor, while so fixed, came into the possession of the said company, and the said company, while the said anchor was so in their possession, and before the committing of the grievance thereafter next mentioned, had notice of the premises; that, while the said anchor was in the possession of the said company, so fixed as aforesaid, and before the committing of the grievance thereafter next mentioned, the said anchor, until the same

*349] **became removed as thereafter mentioned, was continued by the said company so fixed as aforesaid*; that, afterwards, and while the said anchor, so fixed, was in the possession of the said company, the said anchor had become removed from the said known part of the said river, wherein the same ordinarily remained, whereof the said company, afterwards, to wit, on the day and year aforesaid, had notice, and the same remained in and on the soil of the said river, in some part thereof not indicated, covered by ordinary tides, whereof the defendants, to wit, on the day and year aforesaid, had notice; that, before the committing of the said grievance, the said last-mentioned part whereat the said

anchor was situated, was unknown to the plaintiffs, and was unknown to them without their default; that, before the committing of the said grievance, a reasonable time, to wit, ten days, had elapsed, from the time of the said company having notice that the said anchor had become so removed as aforesaid, and that the same remained in the river in some part covered by the ordinary tides, and not indicated, as aforesaid, and the defendants, during all the time aforesaid, had the means and the power of properly placing the said anchor, and of securing and properly fixing the same, and of indicating and making known the situation of the same: Yet that the defendants, knowing the premises, did not nor would, within a reasonable time after such notice as aforesaid, properly place the said anchor, or secure, or endeavour to secure, and properly fix the same, or indicate or make known the situation of the same, but wholly neglected so to do; and that, by means thereof, the said ship of the plaintiffs, then, to wit, on the day and year aforesaid, lawfully going, sailing, and passing, in and along the said river, in a part ordinarily used by ships, and not the part thereof at which the said anchor had been originally placed, and ordinarily remained, as aforesaid, ran foul of and struck against and on the said anchor of the defendants, [*350 which thereby made divers holes in the bottom of the plaintiffs' said ship, and destroyed the timbers thereof, and the said plaintiffs' said ship then sank in the said river, and was otherwise much broken, spoiled, damaged, and depreciated in value; and also, by reason of the premises, the plaintiffs had been forced and obliged to pay, lay out, and expend, and had necessarily paid, laid out, and expended, a certain large sum of money, to wit, the sum of 1000*l.*, in and about the raising of the said vessel, conveying and discharging the cargo, and repairing the said damage, and supporting the crew of the said ship, for a reasonable time after the said damage so done as aforesaid; and also, by means of the premises, the plaintiffs lost and were deprived of a portion of the said coal, to wit, twenty tons thereof, of the value of 50*l.*, and also lost and were deprived of the use of their said vessel, for a long space of time, to wit, for the space of five weeks, and thereby lost and were deprived of all the advantages and profits, to a large amount, to wit, 200*l.*, which during that time they might and would otherwise have derived and acquired from the use of their said vessel, &c.

Special demurrer, assigning for causes,—that it is not averred, nor does it appear, in or by the said declaration, that it was the duty of the defendants properly to place the said anchor, or to secure or properly to fix the same, or to indicate or make known the situation of the same;—that it is not averred, nor does it appear by the said declaration, by whom the said anchor was originally placed and fixed in the soil of the said river in the declaration mentioned, or that the same was wrongfully placed and fixed there, or that the defendants were privy to the placing or fixing of the same there, or that the defend-

ants could have prevented the same from being so placed and fixed ;—
 *351] *that it is not averred, nor does it appear in or by the said declaration, that the said anchor became removed, as in the declaration is mentioned, by any consent or fault of the defendants, or that the defendants caused such removal to take place, or that the defendants had the power, or that it was their duty, to have prevented such removal, or that they were in any way answerable for such removal, or that the defendants were privy to such removal, or that such removal was wrongful ;—that it is not averred, nor does it appear in or by the said declaration, that the defendants were possessed of, or had any control over, the said anchor, at the time it was originally placed and fixed in the soil of the said river ;—that it is not averred, nor does it appear in or by the said declaration, that the defendants had any legal right or legal power properly to place the said anchor, or to secure or properly fix the said anchor, or to indicate or make known the situation thereof ; and that the averment in the declaration, that the defendants had the means and the power of so doing, is too vague and uncertain, and that it is uncertain whether by the words “ means and power,” as used in the last-mentioned averment, is meant legal means and legal power and right, or physical means and physical power merely ;—that it is not averred, nor does it appear in or by the declaration, that the defendants have been or were guilty of any breach of duty which rendered them liable to the plaintiffs for the damages in the declaration mentioned ;—that notwithstanding anything which is averred, or which appears in or by the said declaration, the said ship of the plaintiffs in the declaration mentioned may have run foul of and struck against the said anchor, as in the declaration mentioned, by reason of some want of skill or care, or improper conduct of the plaintiffs or their servants or agents in that behalf ;—that, notwithstanding anything which is *averred or which appears in or by
 *352] the said declaration, the said ship of the plaintiffs in the declaration mentioned may have run foul of and struck against the said anchor, as in the declaration mentioned, without any fault on the part of the defendants ;—that the said declaration does not disclose with sufficient certainty any cause of action against the defendants, &c.

Joinder in demurrer.

Channell, Serjt., with whom was *J. Addison*, in support of the demurrer.—There is no averment that it was the duty of the defendants to place or secure the anchor properly or to indicate its situation. The want of that averment may not be material : but it is essential that the duty should appear on the face of the declaration,—*Brown v. Mallett*, 5 Com. B. 599 (E. C. L. R. vol. 57)—which it does not. It does not appear who fixed the anchor. It is consistent with the statement in the declaration, that the anchor may have been removed by circumstances over which the defendants had no control. It is merely alleged that the defendants had notice of the removal. [MAULE, J.—It appears that the defendants had

notice of the removal of the anchor, but not to what part it was removed.] Although it is alleged that the defendants had the means and the power of properly placing and securing the anchor, and indicating its situation, yet the meaning of that expression is ambiguous. Does it mean that they had legal power, without committing an act of trespass? or does it mean physical power? The corporation of Newcastle are conservators of the river. [MAULE, J.—In its largest sense, it means both. You must take “means and power” in their ordinary sense.] The breach is, that the defendants did not, within a reasonable time after such notice, properly *place the anchor, or secure, or endeavour to secure and properly [*353 fix the same, or indicate or make known the situation of the same. But it does not appear that it was their duty to do so. They might possibly have had the power to do so; but it might be at a greater expense than it was worth their while to incur. In *Brown v. Mallett*, MAULE, J., delivering the judgment of the court, says: “In the case of *The King v. Watts*, 2 Esp. N. P. C. 675, Lord KENYON held, that the owner of a ship sunk in the Thames by accident and misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended, for the prosecution, in that case, that, although the defendant was not *punishable* for causing the nuisance, it having arisen from accident, it was his *duty* to remove it: but the learned judge answered, that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might, and probably would be greater than any private benefit which the owner would derive from it: and, whether it were greater or not, the reason seems to be the same, for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered. In the case of such impediments to navigation arising out of unavoidable accident, the proper rule seems to be, that the expense of removing or diminishing the danger arising from them, should be defrayed by those who would be benefited by such a measure; as is done in the case of light-houses, which are erected to diminish the danger *arising from [*354 natural impediments to navigation; and such measures are the proper subjects of local regulations, to be made on a comparison of the danger to be guarded against, and the expense to be incurred. It is scarcely necessary to observe, that, if no indictment would lie, under the circumstances stated in this action, for the danger and impediment to the public, no action can be maintained for the particular damage sustained by the plaintiff. The duty of the defendant, if it exist at all, is of a public nature; and the plaintiff, in order to succeed, must show a breach of public duty, as well as special injury to himself.”

Barstow, contra.—This declaration sufficiently discloses a duty on the part of the defendants, and a breach of that duty, to entitle the plaintiff to maintain the action. In *Brown v. Mallett*, the obstruction was caused by misfortune. But, here, the defendants, or some persons for whose acts they are responsible, for their own purposes, placed the anchor in the river. [MAULE, J.—In its original position?] Yes. The declaration alleges that the anchor was in the possession of the defendants at the time of the injury. Whether the placing it in the river originally was lawful or not, is immaterial: it came into the defendants' possession, and it remained there. [WILLIAMS, J.—Suppose some one had wrongfully removed the anchor, would it not still remain in the possession of the proprietors? MAULE, J.—Suppose a person unknown to the owner, removes an anchor from a distance, say from the anchor-smith's yard, and drops it in a place where it is a nuisance to a navigable river, is the owner bound to remove it, or to indicate its position?] This anchor appears to have been removed from some place in the river. [MAULE, J.—That makes no difference: the original position is quite immaterial.] It was the defendants' duty to indicate *the situa-
 *355] tion. [MAULE, J.—No.] It became displaced, and it was not necessary that the plaintiffs should aver that it had been removed by some person or persons unknown, or by the winds and waves. Supposing the weather had caused it. [MAULE, J.—In that case, it would be the defendants' misfortune, and they would not be bound to refix it,—according to the authority of *Brown v. Mallett*, which was strictly founded upon *The King v. Watts*.] The defendants left the anchor there. Lord HALE says that it is unlawful to leave an anchor in a navigable river, without a buoy: Hale, *De Portibus Maris*, ch. vii.(a) [MAULE, J.—I say so too. And so said Lord ELLENBOROUGH, in *Harmond v. Pearson*, 1 Campb. 515. Here, the declaration complains of a public nuisance:(b) but it does not say that the defendants committed it.] It is averred that the anchor was removed without the knowledge of the defendants: but, having originally placed it in the river for their own profit and convenience, are not the defendants responsible for what afterwards becomes of it? [MAULE, J.—If a man has a gun, and another person fires it off, and injures a third party, is the owner of the gun liable?] Probably not.(c) But that case is not identical with the present. This is the case of a *leaving* of the anchor; for which the defendants are responsible.

MAULE, J.—This declaration in effect states that an anchor, the property of the defendants, somehow was placed in a part of a navigable river; but *how*, is not stated. The circumstance of the anchor being the defendants' property, will not of itself render them liable. To have

(a) Hargr. Tracts, p. 85.

(b) 1 Hawk. P. C. ch. 75, § 13.

(c) See *Dixon v. Bell*, 5 M. & Selw. 198, *Lynch v. Nurdin*, 1 Q. B. 29, 4 P. & D. 672.

this effect, it must amount to a public *nuisance, and a private injury, *by them*. This declaration carefully steers clear of stating [*356 that the defendants did the mischief. It shows about as good a cause of action, as if it had stated that somebody beat the plaintiff with the defendants' stick. The case falls within *The King v. Watts and Brown v. Mallett*.

CRESSWELL, J.—I am of the same opinion. The person who drew this declaration saw the difficulty, but has not succeeded in avoiding it. No negligence or want of care is imputed to the defendants, either in placing the anchor where it was originally placed, or in allowing it to be removed.

WILLIAMS, J., and TALFOURD, J., concurring,

Judgment for the defendants.

NEWTON v. CHAPLIN.

Where a written document is in the possession of a witness who is not compellable to produce it, and he refuses to do so, secondary evidence of the contents is admissible.

Where a person, not party to a suit, attends on a common *subpoena*, and is called as a witness, and refuses to permit the production of a document which his attorney has brought into court in obedience to a *subpoena duces tecum*, but which the latter also declines to produce; the plaintiff, having done everything that could be done to make apparent the impossibility of using the primary means of proof, is entitled to resort to secondary evidence of the contents, and is not precluded from so doing by his omission to serve the client with a *subpoena duces tecum*. A barrister, party to a cause, cannot be allowed to address the court, where he is represented by counsel.

THIS was an action of assumpsit for money had and received, brought to recover the balance of a deposit of two guineas per share paid by the plaintiff upon forty shares which had been allotted to him in *a projected company called The Direct Sheffield and Manchester [*357 Railway Company.

The defendant pleaded non assumpsit.

At the trial before WILDE, C. J., at the sittings at Westminster, after Michaelmas term, 1848, the plaintiff sought to sustain his case by showing that the defendant was the managing director of the company, and that, by his connivance, and that of others associated with him in the management, advertisements had been issued containing false and fraudulent statements, by which the plaintiff had been induced to take the shares and pay the deposit, and also by showing a failure of consideration.

One Newton, a news-agent, was called for the purpose of producing the manuscript of certain advertisements which had been sent to him by the secretary of the company for insertion in various newspapers; and, in particular, it was proposed to give evidence of the insertion of one in the Times of the 17th of October, 1845, which was said to contain false

and fraudulent statements as to the position and prospects of the company. This being objected to on the part of the defendant, on the ground, that, as the case then stood, there was no evidence before the jury to connect the defendant with those by whose authority the advertisement had been inserted,—and the lord chief justice being of opinion that the evidence was not admissible, unless the defendant could be shown to have been at that period connected with the company,—it was then proposed on the part of the plaintiff, to put in the minute-book of the company; and, for this purpose, he called Mr. Fry, the defendant's attorney.

It appeared that Fry had been solicitor to the company; that the company was dissolved; and that one-half of the deposit upon each share had been returned to the allottees. Fry had been served with a *subpœna* *358] **duces tecum*. He stated that he held the book in his hand; but he declined to produce it, on the ground of privilege in William Chaplin, the defendant's brother, from whom he, Fry, had received it for the purpose of defending him in an action brought against him as a member of the provisional committee.

The lord chief justice, having consulted the other judges, (a) who were sitting *in banco* in the adjoining court, decided that Fry was, under the circumstances, justified in declining to produce the book.

William Chaplin was in court, having been served by the plaintiff with a *common subpœna*; and he was asked whether he would consent to the book being produced, but he declined to do so.

The plaintiff then proposed to give secondary evidence of the contents of the book, from the mouth of the secretary of the company. But it was insisted, on the part of the defendant, that, inasmuch as William Chaplin, the client, had not been served with a *subpœna duces tecum*, the plaintiff had not done all that he was bound to do, to show the primary evidence to be unattainable, and consequently was not entitled to give secondary evidence.

The lord chief justice expressing himself of opinion that this objection was well founded, the plaintiff submitted to be nonsuited.

Atherton, in Michaelmas term, 1848, moved for a new trial, on the ground that secondary evidence of the contents of the minute-book ought to have been admitted. The plaintiff could not have anticipated that Fry would object to produce the book; nor could he know the party on whose account the privilege was to be set up. The attorney held the *359] book equally on behalf of all *who might be interested therein in the like degree with William Chaplin,—and, amongst others, for the plaintiff himself. [WILDE, C. J.—He did not receive the book as the general attorney for the company, but as the attorney for William Chaplin only, and for the sole purpose of *his* defence, after the company had ceased to exist.] Considering the circumstances under which the

(a) COLTMAN, J., MAULE, J., CRESSWELL, J., and WILLIAMS, J.

plaintiff was excluded from the best evidence, he clearly ought to have been allowed to resort to secondary evidence. [MAULE, J.—In effect, you say that he had used due diligence.] Precisely so. In *Marston v. Downes*, 6 C. & P. 381 (E. C. L. R. vol. 25), where, in an action against a mortgagor, the attorney for the mortgagee, who had the mortgage deed, declined to produce it, PATTESON, J., allowed secondary evidence to be given of its contents: and the court upheld his ruling.(a) So, in *Doe d. Gilbert v. Ross*, 7 M. & W. 102,† it was held, that, where a deed is in the hands of an attorney, who holds it, not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a *subpœna duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents. PARKE, B., in the course of the argument, says:(b) “If a party does all in his power to produce the deed, but is not able to procure its production, is not that enough? Then, is it not enough to subpœna the attorney, *duces tecum*, to produce it? *Marston v. Downes* appears to have settled that it is.” [WILDE, C. J.—Due diligence being used.] Subpœnaing the attorney, in whose possession the deed was, is using due diligence, in the sense meant by PARKE, B. In delivering the judgment of the court, the learned baron says:(c) “It appeared *that the original settlement was in the hands of Mr. Stafford Baxter, attorney [360 for a Mr. Weetman, but he did not hold it merely as attorney, but also as a security for money advanced by him to his client. Baxter, when called upon on a *subpœna duces tecum*, refused to produce the deed; and Lord DENMAN was of opinion that secondary evidence of its contents was then admissible; and in that opinion we entirely concur. The rule on that subject is, that the law excludes such evidence of facts, as from the nature of the thing supposes still better evidence in the party’s possession or power;(d) which rule is founded on a sort of presumption that there is something in the evidence withheld, which makes against the party producing it. But, if such evidence is shown to be unattainable, the presumption ceases, and the inferior evidence is admissible. If, therefore, a deed be in the possession of the adverse party, and not produced, or lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and, if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the same, for the original is then unattainable by the party offering the secondary evidence. And this is one of the points ruled in *Marston v. Downes*.” [WILDE, C. J.—I thought there had not been sufficient diligence used, to entitle the plaintiff to give secondary evidence, William Chaplin not having been

(a) 1 Ad. & E. 31 (E. C. L. R. vol. 28), 4 N. & M. 861 (E. C. L. R. vol. 30).

(b) 7 M. & W. 114.†

(c) 7 M. & W. 121.†

(d) 1 Phillips on Evidence, 9th edit. 434, 10th edit. 452.

served with a *subpœna duces tecum*. I adopted that view from the case of *Bowles v. Johnson*, 1 W. Blac. 86. I have known such evidence rejected on that ground in many cases.] The plaintiff had no means of knowing that Fry had received the book from William Chaplin. *861] [MAULE, J.—He might *have asked Fry.] It was reasonable to presume that he had the book from the company, as he had been their attorney: the not having asked Fry, therefore, cannot be called want of due diligence. Secondary evidence was admitted in *Ditcher v. Kenrick*, 1 C. & P. 161 (E. C. L. R. vol. 12).

A rule nisi having been granted,

Bovill, in Michaelmas term, 1849, shewed cause.—The lord chief justice was perfectly right in refusing to compel Fry to produce the book in question. It came into his possession as the attorney of William Chaplin only, and for the purpose of defending him against an action. To say that the plaintiff had an interest in the book, is a fallacy; for, the very ground of the action, is, a repudiation by Mr. Newton of all connexion with the company.

With respect to the admissibility of secondary evidence, the objection is, that the plaintiff had not done all that was requisite to entitle him to give secondary evidence of the contents of the book. Undoubtedly, there are authorities to show, that, where an attorney refuses to produce a deed or other document, or to state its contents, the other party may give secondary evidence; but that is only provided he has used all due diligence to obtain the best evidence, by serving the client with a *subpœna duces tecum*. *Marston v. Downes* has been explained, and placed upon a more correct footing, in a recent case of *Hibberd v. Knight*, 2 Exch. 11,† where it was held that an attorney cannot be compelled by the court to disclose the contents of a client's deed in his possession, but that, if he do so *willingly*, the evidence may be received. PARKER, B., there says: "The case of *Marston v. Downes* is often referred to. There, a witness, an attorney, refused to produce a title-deed, because *862] *it was his client's, but he told the contents of the deed willingly. My brother *Ludlow* objected to the evidence, not on the ground that the attorney was privileged, but that no secondary evidence could be given of the deed, which was itself in existence. My brother PATTERSON ruled that secondary evidence might be given, as the party was not obliged to give up his deeds, and that, if the attorney did not insist upon his privilege, but chose willingly to disclose the contents of them, the evidence might be received. Thus explained, the case is correct. Where a deed is in the possession of a person, which he is not obliged to produce under a *subpœna duces tecum*, you may give secondary evidence of its contents, as you have done everything to obtain it. The cases of *Ditcher v. Kenrick*, 1 C. & P. 161 (E. C. L. R. vol. 12), and *Doe d. Gilbert v. Ross*, 7 M. & W. 102,† are authorities which show this." And ALDERSON, B., said: "The second point in the case of

Marston v. Downes requires explanation. It would seem, from the report of that case, that an attorney can be compelled by the court to divulge the contents of his client's deed. The court will hear him, and receive his evidence, if he does so *willingly*; but the court cannot insist upon it." [MAULE, J.—I presume that the learned barons do not mean that the attorney may in all cases betray his client.] *Hibberd v. Knight* was acted upon in *Doe d. Lord Egremont v. Langdon*, 12 Q. B. 711 (E. C. L. R. vol. 64). There, to prove the existence of an outstanding term, the defendant called for the production of the deed creating it. The witness called upon, stated that he held the deed as attorney for a mortgagee of the land, and that his client refused to produce it: and the witness himself declined to produce it, or to give oral evidence of its contents. The defendant then called as *a witness the attorney of [*363 a party who had made a contract with the lessor of the plaintiff for exchange of lands: and he stated, that, on making the contract, the attorney for the lessor of the plaintiff had furnished him with an abstract, referring to the deed in question, which abstract he compared with the original; that he held the abstract as evidence of the contract; and that he had no instructions from his client, but would produce the abstract if the judge thought he ought to do so. The judge said that he thought there was no sufficient reason why the witness should not; and it was produced as secondary evidence of the deed creating the term: and the court held that the evidence was properly received. In *Doe d. Gilbert v. Ross*, the attorney refused to produce the deed, not on the ground of his client's privilege, but on the ground of his own lien.

Newton, in person, was desirous of being heard in support of the rule, together with *Atherton*. [WILDE, C. J.—We cannot hear the plaintiff in person, and by counsel also: the circumstance of the plaintiff's being a member of the bar does not place him in a better position in this respect than another person.] The court may in its discretion hear both. [WILDE, C. J.—I think not.] In *Newton v. Harland*, 1 M. & G. 650 (E. C. L. R. vol. 89), 1 Scott, N. R. 482, TINDAL, C. J., permitted me to argue in my own case, in conjunction with *Warren*. [MAULE, J.—You must make your election to be heard by yourself or by your counsel. We will at present hear either; and, when the proper time arrives, we will consider what course ought to be pursued.]

Atherton, in support of the rule.—The defendant's counsel has very ingeniously evaded the real question between these parties. *Newton* was equally interested *with William Chaplin in the book which contained the account of the proceedings of the company. There [*364 was no doubt as to the nature of the book; nor was it disputed that *Newton* had paid the deposit and obtained scrip. In whose hands soever, therefore, the book might be, the person holding it, held it as trustee for all who were interested in the concern. Unless it can be said that the provisional committee only were interested in the book, it

is difficult to conceive how any doubt could arise. The bringing of the action does not involve a repudiation by the plaintiff of all connexion with, or interest in, the company. The plaintiff claims to be entitled to recover back money which he has by misrepresentation and fraud been induced to part with. The very foundation of that claim is, that he is a scrip-holder. [MAULE, J.—A man has a document in his possession, the disclosure of which may utterly ruin him. For his necessary defence in another action, he confides it to his attorney. Is it to be said that the attorney is bound to produce it, because some other person whom he, the attorney, does not represent, and has no connexion with, has an interest in it?] If the book had remained in the hands of William Chaplin, he might have been compelled to produce it by means of a *subpœna duces tecum*. [MAULE, J.—The necessary effect of the doctrine you are contending for, will be, that henceforth no man can safely trust his attorney with his secrets or his deeds. Fry had been served with a *subpœna duces tecum*; but William Chaplin had not. The privilege of the latter as to the book was the same in the hands of Fry, as if he had kept the book in his own hands. Its non-production was clearly right.]

Then, immediately upon the refusal of Fry to produce the book, the plaintiff was entitled to give secondary evidence of its contents; and, assuming that that is not so, the fact of William Chaplin himself being *365] in court, *and brought there as a witness for the plaintiff, though without a *subpœna duces tecum*, unquestionably gave him that right. The rule to be deduced from all the cases, is, that, where a deed is in court, in the hands of an attorney, who has received a *subpœna duces tecum*, and who declines to produce it, on the ground of privilege, and the claim of privilege is admitted, all the sources of primary evidence are exhausted, and the party calling for the deed is entitled to give secondary evidence of its contents, notwithstanding the client has been served with a *subpœna duces tecum*. [MAULE, J.—Do you rely on the document's being in court, as a material circumstance?] It may or may not be. The proposition contended for was expressly admitted in *Marston v. Downes*, 6 C. & P. 381 (E. C. L. R. vol. 25), 1 Ad. & E. 31 (E. C. L. R. vol. 28), 4 N. & P. 861, which was confirmed in *Hibberd v. Knight*, 2 Exch. 11,† except in so far as the latter case rectifies an error in the former. In *Ditcher v. Kenrick*, 1 C. & P. 161 (E. C. L. R. vol. 12), the rule is stated without any qualification; as also in *Doe d. Lord Egremont v. Langdon*, 12 Q. B. 711 (E. C. L. R. vol. 64). The fact of William Chaplin's having been served only with a common *subpœna*, makes no difference. A *subpœna duces tecum* is but a means to an end: if the party and the document are both in court, the court has power to compel production, no matter how they come there. What is the ground upon which secondary evidence is received? The court is bound to administer justice upon the best possible

evidence: but, inasmuch as the party may, without any default of his own, be disabled from adducing primary evidence, upon his showing that due diligence has been used for that purpose, secondary evidence is let in. In *Snellgrove v. Stevens*, Car. & Marsh. 508 (E. C. L. R. vol. 41), which was an action of trespass for a seizure made by virtue of a warrant issued by the defendants as commissioners under a court of requests *act,—it being necessary, in the course of the trial, [*366 to produce the record-book of the court of requests, and the warrant of execution, and the attorney for the defendants, who was also the officer of the court of requests, having the custody of both documents, being in court, and having both with him, but declining to show the *warrant*, because he had only received notice to produce the *book*,—CRESSWELL, J., said: “A witness here, sworn to give evidence, and having a document in his possession, may be compelled to produce it: he is just as much under the control of the court in this respect as if he had brought the document under a *subpœna duces tecum*.” And, in *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448 (E. C. L. R. vol. 61), it was ruled, that, if a deed be in the possession of a third person as mortgagee, and he, having the deed in court, though not subpœnaed in the cause, declines to produce it, secondary evidence may be given of its contents; but that, if the deed is not in court, and he has not been subpœnaed to produce it, it is otherwise. Here, all had been accomplished that could usefully be done. The attorney, in whose custody the book was, had been served with a *subpœna duces tecum*, and had the deed in court; and the client was in court under a common *subpœna*: to have served the latter with a *subpœna duces tecum*, when the document was not in his custody, would have carried the case no further.

Newton now claimed to be heard.

Per Curiam.—Counsel having been heard, it would be contrary to reason and precedent to hear the party also. *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court.

*In this case, a rule was obtained for a new trial, on the ground [*367 of the improper rejection of evidence.

The action was brought to recover, as money had and received to the plaintiff's use, the deposits paid on an allotment of shares in the Sheffield and Manchester Railway, against the defendant, as one of the directors of the company, on the ground of fraud, and failure of consideration.

In the course of the plaintiff's case, it was attempted to connect the defendant with the act of inserting an advertisement in a newspaper; and, in order to do so, it was proposed to put in evidence the minute-book of the provisional committee. For that purpose, an attorney named Fry, who had been attorney for the company, and who had been served with a *subpœna duces tecum* as to the book in question, was called as a witness. He said that he had the book with him in court: but he refused to produce it, because he had received it professionally, from the defendant's

brother, William Chaplin. The lord chief justice, before whom the cause was tried,—after having consulted the judges then sitting *in banco* in the adjoining court,—decided that the witness was justified in this refusal: whereupon it was proposed, on the part of the plaintiff, to give secondary evidence of the contents of the book, by the examination of the secretary of the company.

William Chaplin had been subpoenaed by the plaintiff, and had been examined as a witness; and, on being asked, he objected to the book being produced. But, as he had not been served with a *subpœna duces tecum*, it was contended by the counsel for the defendant, that secondary evidence was not admissible: and the lord chief justice, being of that opinion, refused to receive it.

*368] The plaintiff having been nonsuited, afterwards *obtained a rule for a new trial, on the ground that secondary evidence ought to have been admitted.

The general doctrine is clear, that, if a written document is in the possession of a witness who is not compellable to produce it, and he refuses to do so, secondary evidence of the contents is admissible. But, in *Doe d. Gilbert v. Ross*, 7 M. & W. 102,† a point was suggested by the Court of Exchequer (which it became unnecessary to decide), that, if the witness, who refuses to produce the deed, be an attorney, relying on the privilege of his client, it is possible, that, although the attorney might refuse to disclose the instrument which was confided to him by his client, the client himself might not be unwilling that it should be disclosed; and therefore, unless he is subpoenaed to produce the instrument, and refuses to do so, all has not been done which might be done to show the primary evidence unattainable; and, consequently, that secondary evidence is not admissible.

In the present case, the client, William Chaplin, having attended on a common subpoena, and having been called as a witness, refused to permit the production of the book, which the attorney had brought into court in obedience to a *subpœna duces tecum*. And the only objection is, that the client himself had been served with a *subpœna duces tecum*.

But we are of opinion,—in accordance with the decision of ALDERSON, B., in *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448 (E. C. L. R. vol. 61),—that, as the book was actually in court and the plaintiff had procured the attendance, as witnesses, of both the attorney and the client, who expressed in court, their refusal to allow the book to be produced, he had done everything that could be done to make apparent the impossibility of using the primary means *of proof; and, consequently, *369] that he was entitled to resort to secondary evidence.

We are, therefore, of opinion that the rule for a new trial must be made absolute.

Rule absolute.(a)

(a) The conclusion to which the court came rendered it unnecessary to determine whether or not the attorney was compelled to produce the book at the trial.

Where an original paper is in the hands of an attorney, under such circumstances that he

cannot be compelled to produce it, the party may prove and exhibit a copy. *Lynde v. Judd*, 3 Day, 499. An original paper, in the hands of a person who cannot be reached by process of court so as to compel its production, may be proved by parol. *Ralph v. Brown*, 3 Watts & Serg. 395. Where a writing is executed to a third person, who resides out of the state, it is competent, after proof of its execution and delivery, to give evidence of its contents. *Waller v. Cralle*, 8 B. Monroe, 11; *Vaughn v. Biggers*, 6 Georgia, 188.

FORD v. GRAHAM. Nov. 5.

It is entirely in the discretion of a judge, to grant or refuse a *habeas corpus*, to enable a prisoner to attend to show cause against a summons.

Semble, that a special ground should be laid for such an application.

THE plaintiff, being a prisoner in the Queen's prison, applied to MAULE, J., at chambers, for a *habeas corpus* to enable him to appear to show cause against a summons. The learned judge refused to grant it; and, a second summons having been taken out, an order was made thereon, which was afterwards made a rule of court.

Hawkins now moved for a rule to show cause why the order and rule of court should not be set aside, on the ground of the improper refusal of the *habeas*.

MAULE, J.—I do not see why a prisoner should have a *habeas corpus* whenever he pleases, in order that he may come out and conduct his business, whether that business consists of a proceeding in court or at chambers, or of anything else.

JERVIS, C. J.—The matter is clearly in the discretion of the judge; and I think the refusal was justified, no special ground being laid for the indulgence.

The rest of the court concurring, Rule refused.

*HOOPER v. WOOLMER. Nov. 11. *370

In assumpsit on the following memorandum,—“A. agrees to let, and B. to take, two rooms in the messuage of A., at the rent of 48*l.* per annum, payable quarterly; and B. agrees to pay the proportion of rates, taxes, and assessments, which now are, or hereafter may be, assessed on the premises so taken by B.”—the declaration alleged, that, whilst B. was tenant, divers rates, &c., were assessed on the messuage; that the said rates, &c., became due on a certain day, and were paid by A.; and that the proper and reasonable proportion of the said last-mentioned rates, &c., to be paid by B. in respect of the demised premises, according to the agreement, was “a certain proportion thereof, to wit, one third part thereof, amounting, to wit, to 50*l.*,”—of all which B., before the commencement of the suit, had notice, and was then requested by A. to pay the same, &c. :—

Held, that a plea traversing the request to pay, was bad, as attempting to raise an immaterial issue. Held also, that a special traverse, that “the proper and reasonable proportion of the said rates, &c., to be paid by B. in respect of the said demised premises, was a certain proportion, amounting to 12*l.* 10*s.*, and no more,—*obsequo hoc*, that the said proper and reasonable proportion of the said rates, &c., was 50*l.*, in manner and form, &c.” was bad, for the same reason.

Where the plaintiff has delivered all the demurrer books, he cannot call upon the defendant to

pay for those delivered to the junior puisne judges, as a condition of his being heard, unless he has himself *strictly* complied with the rule of Hilary Term, 4 W. 4, by delivering the books for the defendant on *the day following* that on which the defendant should have delivered them.

THIS was an action of assumpsit. The first count of the declaration stated that a certain agreement was made by and between the plaintiff and the defendant, in the words following, that is to say, "18th of August, 1847. Memorandum of the terms on which Mr. S. Hooper agrees to let, and Mr. S. F. Woolmer to take, the ground-floor, consisting of two rooms, in the messuage of the said S. Hooper, at the rent of 40*l.* per annum, payable quarterly: And the said S. F. Woolmer agrees to pay the proportion of rates, taxes, and assessments, whether parliamentary, parochial, or otherwise (except landlord's property-tax), which now are, or hereafter may be assessed on the said premises so taken by the said S. F. Woolmer." Mutual promises. The count then proceeded to
 *371] aver, that, whilst the defendant **was* tenant of the said premises, divers rates, taxes, and assessments, other than landlord's property-tax, amounting to a large sum, to wit, 250*l.*, were assessed on the said messuage in the agreement mentioned, whereof the said demised premises were and are parcel as aforesaid; that the said rates, taxes, and assessments became on a certain day, to wit, the 2d of July, 1850, due and payable, and were then respectively paid by the plaintiff; and that the proper and reasonable proportion of the said last-mentioned rates, taxes, and assessments, to be paid by the defendant in respect of the said demised premises, according to the form and effect of the said agreement, was a certain proportion thereof, to wit, one-third part thereof, amounting, to wit, to the sum of 50*l.*—of all which the defendant, before the commencement of the suit, had notice, and was then requested by the plaintiff to pay the last-mentioned sum of money, &c.

The defendant pleaded,—first, as to 12*l.* 10*s.*, parcel of the 50*l.*, tender.

Secondly, that the defendant was not requested to pay, in manner and form as in the declaration alleged.

Fourthly, as to the residue of the 50*l.*, that the proper and reasonable proportion of the said rates, taxes, and assessments to be paid by the defendant, in respect of the said demised premises, was a certain proportion, amounting to the sum of 12*l.* 10*s.* and no more,—*absque hoc*, that the said proper and reasonable proportion of the said rates, taxes, and assessments, was a certain proportion or part thereof, to wit, the sum of 50*l.*, in manner and form as in the declaration alleged.

The plaintiff demurred to the second plea, assigning for cause that it attempted to raise an immaterial issue; and to the fourth, on the ground of uncertainty and multifariousness, it being uncertain whether the plea meant to traverse the allegation that the proportion of one-third was
 *372] the proper one, or that the rates amounted **to* 50*l.*, or to put in issue both the proportion and the amount.

Couch, for the plaintiff, objected to the defendant's being heard until he had paid for the demurrer-books which had, upon his default, been delivered by the plaintiff to the two junior judges, pursuant to the rule of Hilary term, 4 W. 4, r. 7.(a) It appeared, that the defendant's demurrer-books ought to have been delivered on *Tuesday*, the 5th instant, and that, he having failed to deliver them, the plaintiff's attorney delivered them for him on *Saturday*, the 9th.

Needham, contra, submitted, upon the authority of *Fisher v. Snow*, 3 Dowl. P. C. 27, that the plaintiff had not complied strictly with the rule, and therefore was not entitled to costs. In that case, the defendant's demurrer-books ought to have been delivered on *Thursday*, and the plaintiff did not deliver them until *Saturday*: and LITLEDAL, J., said, "I think, under the circumstances, the plaintiff is not entitled to the costs of these copies before the plaintiff is heard. The rule says, that, 'in default thereof by either party, the other may, on the *day [*373 following, deliver such copies.' Now, although a delivery on the next day but one may be sufficient to enable the plaintiff to proceed with the argument, yet, as the plaintiff seeks to make the defendant pay costs, he ought to have delivered the extra copies on the day following that on which the delivery ought to have been made by the opposite party."

JERVIS, C. J.—The plaintiff certainly has not brought himself strictly within the rule.

Couch, in support of the demurrer.—The second plea is bad for seeking to put in issue an immaterial averment in the declaration, viz. the request. The declaration alleges the fact of the assessment, and of the payment of the rates and taxes by the plaintiff, and that the defendant had notice thereof. There is nothing in the agreement requiring any special request to the defendant to pay his proportion: his duty and liability to pay arose immediately upon the payment by the plaintiff. In *Wallis v. Scott*, 1 Stra. 88, the plaintiff declared that the defendant, in consideration the plaintiff would make him a set of sails worth 45*l.*, promised to pay so much for them upon request; and averred that he made the *said sails*, and that the defendant, although often requested, refused to pay. Upon demurrer, it was contended,—first, that 'this being a special contract, the plaintiff must show a performance of all on his part, which he had not done; for, he had not averred that he made the

(a) Which provides, that, "four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer-book; special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and, in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies." See *Jervis's Rules*, 2d edit. p. 107.

sails worth 45*l.*, and if they were not worth it, the defendant was not chargeable. Secondly, the action being founded upon the breach of contract, there ought to be a special request laid: for, this differs from the cases where there is a precedent debt or duty whereon to ground the *374] *promise, for, there it is admitted the action is a request: *Selman v. King*, Cro. Jac. 183. The defendant, in consideration the plaintiff, being an innkeeper, would entertain the defendant's commissioners, promised to pay for their lodging and diet upon request; and, there being nothing but the general *licet sapius requisit'*, judgment was arrested upon that distinction between a collateral contract for a thing *in fieri*, and a precedent debt or duty. And to the same purpose is *Hill v. Wade*, Cro. Jac. 523. In *Birke v. Trippet*, 1 Saund. 82, assumpsit on mutual promises to perform an award, or pay each other 40*l.* upon request, and in an action for the 40*l.* the declaration was held ill, because no request was alleged, and the former cases and differences were agreed. That no money was to be paid till two things are done, neither of which appear,—1, the making the sails of such a value,—and 2, a request to pay for them." But EYRE, J., said: "I do not think the value need be alleged; but, if it need, yet the *prædict'* takes it in; for, if the value be part of the description, then it is averred that the plaintiff made such a set of sails as was agreed upon, that is, a set of sails which answers every part of the description. Where notice or request are by law necessary, there the general averment will not be sufficient; but it must be particularly set forth, that the court may judge whether the notice or request were sufficient. But, in this case, I take it no request was necessary; for, on the making the sails, the money immediately becomes due. If I promise a tailor, that, in consideration he will make me a suit of clothes, I will pay him so much, there needs no request; for, as soon as he has done his part, there is a duty vested in him. And this differs from the cases where the payment is to be to a third *375] person, or where an award directs a *request." (a) Here, there is a general allegation of notice, which is not denied. [MAULE, J.—The defendant agrees to pay a proportion of rates and taxes. When the proportion payable by him is ascertained, a request to pay is no more necessary than a request to pay the rent.] Clearly not.

The fourth plea is also bad, as attempting to put in issue immaterial matter, viz. the precise amount of the proportion due.

Needham (with whom was *J. H. Hodgson*), contrâ.—The contract, as set out in the declaration, is a peculiar one, and is not properly open to the construction sought to be put upon it by the other side. Supposing

(a) The reporter adds,—“Afterwards, the court being full, *Branthwayte* (Serjt., *pro defendente*) mentioned Cro. Eliz. 773 (probably 721, *Thomson v. Butler*); 91 (*Obaston v. Garton*); Hutt. 107 (*Bill v. Lake*). And *Yorks* quoted Yelv. 66 (*The Case of an Hostler*); 121 (*Ashe v. Doughty*); 3 Bulst. 258 (*Payn v. Selby*); 2 Cro. 639 (*Waters v. Bridge*). And the former cases of 2 Cro. 183 (*Selman v. King*), 523 (*Hill v. Wade*), were denied *per EYRE, J.*, and judgment given for the plaintiff.”

the plaintiff to be entitled to claim a proportion of the rates and taxes assessed upon the premises, not generally, but "so taken by the defendant," there is no distinct averment that there has been such an assessment. [MAULE, J.—The rooms would not be rated separately, but jointly with the rest of the messuage. JERVIS, C. J.—Is this open to you on general demurrer?] The ground of demurrer is, that the second plea puts in issue the request, which it is said is immaterial. There is no distinct averment in the declaration that the defendant had notice of the payment of the rates and taxes by the plaintiff, but only a general averment of notice of all the premises. Wherever notice is necessary, a request *is also necessary; and it is always necessary to allege [*376 a notice, and a request, where the thing is to be done upon the happening of a given event: *Birks v. Trippet*, 1 Wms. Saund. 32. It was there said by *Saunders*, and assented to by the court, that, "where a mere duty is promised to be paid upon request,—as, if, in consideration of all moneys lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum upon request; for, there an *actual request* ought to be made before the action brought." WILLIAMS, J.—There, the request was parcel of the contract.]

The plaintiff has expressly alleged that the proportion of rates and taxes payable by the defendant is 50*l.*; and he founds his breach upon that: but he alleges it within a series of *videlicets*, which makes it difficult for the defendant to take issue upon it. The fourth plea states that the proper and reasonable proportion of the rates and taxes to be paid by the defendant, was 12*l.* 10*s.*, and no more,—*absque hoc*, that the said proper and reasonable proportion was 50*l.*, as alleged in the declaration. [MAULE, J.—The substance of the allegation is, that the proportion payable by the defendant, was a sum of which you had notice. The plaintiff was not bound to make the sum material. His allegation would be supported by proof that it was 12*l.* 10*s.*, provided you had notice of it. It may be a question whether it was incumbent on the plaintiff to give notice of any proportion at all, seeing that the matter was as much in the knowledge of the one party as of the other.] The landlord would have the better means of knowledge. At all events, the jury must inquire what the proportion is; and, *to enable them to do this, [*377 it was essential, that it should be put in issue, and this is the only way of doing so. [MAULE, J.—Might you not have traversed the notice?](a)

Couch, in reply, was stopped by the court.

JERVIS, C. J.—I am opinion that the plaintiff is entitled to judgment.

(a) One assumes to save harmless J. S. of all obligations wherein he shall be bound for J. N.; and, in an *assumpsit* brought, he shows that he was bound in an obligation for J. N., from which he was not saved harmless, and doth not show that he gave any notice to the defendant: yet held to be good enough." Cited by Hovewron, J., in *Hemming's case*, Cro. Jac. 432.

As to the second plea, the question raised, is, whether, under the terms of the contract declared upon, it was necessary that there should have been a request by the defendant to the plaintiff to pay the amount due from him in respect of the rates and taxes, before action brought. The state of facts upon the record is this:—There was a letting by the plaintiff to the defendant of certain apartments at a rent of 40*l.* per annum, *plus* the proportion of rates and taxes assessed on the premises so taken by the defendant. The record shows that the rates and taxes were assessed upon the entire premises, and the declaration claims a proportionate part. The question is, whether there was a primary or a secondary liability on the defendant to pay such proportion. I think it was a primary liability, and that no request was necessary. As to the fourth plea, the plaintiff is also entitled to judgment, unless the amount of the proportion of rates and taxes payable by the defendant was material, which I think it was not. On both pleas, therefore, the plaintiff will have judgment.

*378] *MAULE, J.*—I am of the same opinion. The declaration states an agreement to pay a proportion of rates and taxes; that rates were payable, and paid by the plaintiff; that a certain proportion was the proper and reasonable proportion thereof payable by the defendant; and that the defendant had notice of the premises. I think that shows, without any allegation of request, a liability on the part of the defendant to pay such proportion. It shows a debt due from the defendant to the plaintiff. Putting the request in issue, therefore, puts in issue an allegation that is wholly immaterial. As to the fourth plea, it is difficult to understand what it was intended to put in issue. It is suggested that it means to put in issue the precise amount of the proportion of rates and taxes payable under the agreement by the defendant. I do not think the plaintiff was bound to state the precise amount. The declaration alleges that the proper and reasonable proportion of rates and taxes to be paid by the defendant in respect of the demised premises, was a third part thereof, amounting, to wit, to 50*l.*, of which the defendant had notice. It may be that notice of the *proportion* is material: and I incline to think it is. If the defendant wished to controvert the proportion, probably he might have done so by controverting the notice. But here the defendant seeks to raise an issue which might and ought to have been raised by paying money into court.

WILLIAMS, J.—I am of the same opinion. As to the second plea,—if the defendant had thought it inconvenient to be liable to an action without a previous request to pay, he should have provided against that inconvenience in the agreement. The fourth plea is a mere traverse of an amount, which is wholly immaterial.

*379] *TALFOURD, J.* concurred. Judgment for the plaintiff.
Needham asked leave to amend, by traversing the notice.

JERVIS, C. J.—An amendment is never allowed after judgment, unless there are special circumstances to warrant it.

Amendment refused.

THE QUEEN, on the Prosecution of WILLIAM DAVIS, v.
WILLIAM MILL. Nov. 18.

A count in a *scire facias* to repeal a patent granted to the defendant "for improvements in instruments used for writing and marking, and in the construction of inkstands," contained suggestions (amongst others) of want of novelty and utility in "a certain part" of the said invention. The objections filed with the declaration, pursuant to the 5 & 6 W. 4, c. 83, s. 5, pointed out the *sixth* claim in the specification (amongst others), as wanting novelty, and being useless. The pleas traversed all the suggestions in the count.

After issue joined, the defendant filed a disclaimer, under the 5 & 6 W. 4, c. 83, s. 1, of the fifth, sixth, seventh, and eighth claims mentioned in his specification. These claims related to pens, and to instruments used for marking with a stamp. Those which remained untouched by the disclaimer, were for improvements in pen-holders and pencil-cases, and in the construction of inkstands:—

Held,—first, that the disclaimer, though filed and enrolled after issue joined, was admissible in evidence, and was to be read as part of the original specification, and need not be pleaded *puis darrein continuance*:

Secondly, that the objections filed pursuant to s. 5 were not part of the record, so as to form parcel of the issues to be tried:

Thirdly, that, the disclaimer being received, the defendant was entitled to a verdict upon all the issues:

Fourthly, that the *title* of the letters-patent was satisfied by the specification, as amended by the disclaimer.

SCIRE FACIAS. The declaration, dated the 7th of January, 1850, recited the grant of letters-patent of the 29th of June, 1846, to the defendant, for an invention of "Improvements in instruments *used [*380 for writing and marking, and in the construction of inkstands." After setting out certain of the provisos in the letters-patent contained, the declaration proceeded as follows:—"And whereas we are given to understand that the said grant was contrary to law, in this, to wit, that a *certain part* of the said invention was not, nor is, the working or making of any manner of new manufacture; and also that the said grant was and is prejudicial and inconvenient to our subjects in general, in this, to wit, that a *certain part* of the said invention was and is useless; and also that the said William Mill was not the first and true inventor of the *said* invention within this realm; and also that the *said* invention was not, at the time of making the said grant, a new invention as to the public use and exercise thereof in England and Wales, &c.; and also that the *said* invention was not invented and found out by the said William Mill; and also that the said William Mill did not particularly describe and ascertain the nature of the *said* invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, and cause the same to be enrolled in our said high court of Chancery within six calendar months of the date of the

said letters-patent: and that by means of the several premises, the said letters-patent were and are, and ought to be, void and of no force or effect in law," &c.,—concluding in the usual way.

Pleas,—of Hilary term, 1850,—first, as to the first suggestion in the said writ, that the *said* part of the said invention in the said first suggestion mentioned, was and is the working and making of a manner of new manufacture;—secondly, as to the said second suggestion, that the *said* part of the said invention in that suggestion mentioned was not nor is useless;—thirdly, as to the said third suggestion, that he, the said *381] William Mill, was the first and true inventor of the *said* invention in this realm;—fourthly, as to the said fourth suggestion, that the *said* invention was, at the time of making the said grant, a new invention as to the public use and exercise thereof in England and Wales, &c.;—fifthly, as to the said fifth suggestion, that the *said* invention was invented and found out by the said William Mill;—lastly, as to the said sixth suggestion, that the said William Mill did particularly describe and ascertain the *said* invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, and did cause the same to be enrolled in the said Court of Chancery, within six calendar months of the date of the said letters-patent.

Issue was joined upon each of these pleas, in the same term.

The notice of objections, filed with the declaration, pursuant to the 5th section of the 5 & 6 W. 4, c. 83,(a) contained, amongst others, an objection to the sixth part of the plaintiff's invention as described in the *382] specification, and to the claim in respect thereof, *stating that such part of the invention was old and useless.

The trial took place before WILDE, C. J., at the sittings in Middlesex after last Trinity term. For the prosecution, the letters-patent, the specification, and the notice of objections, were put in.

The letters-patent were dated the 29th of June, 1846, and purported to be for an invention by the defendant of "improvements in instruments used in writing and marking, and in the construction of inkstands."

The specification was enrolled on the 28th of December, 1846, describing eleven different heads of invention. The material parts thereof were as follows:—

"The first part of my invention relates to improvements in ever-

(a) Which enacts, "that, in any action brought against any person for infringing any letters-patent, the defendant, on pleading thereto, shall give to the plaintiff,—and, in any *scire facias* to repeal such letters-patent, the plaintiff shall file (b) with his declaration,—a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: Provided always, that it shall and may be lawful for any judge at chambers,—on summons to show cause why such plaintiff or defendant should not be allowed to offer other objections whereof such notice shall not have been given,—to give leave to offer such objections, on such terms as to such judge shall seem fit.

(b) "Deliver to the defendant or his attorney," by 12 & 13 Vict. c. 109, s. 30.

pointed pencil-cases." "What I claim with respect to this first part of my invention, is, the enclosing a movement, such as is shown in figure 1, in a case, and the arrangements for working the same, as described; and, with respect to the spring point, I do not claim the slitting the points of pencil-cases, being aware that such points have been slit before; but what I claim, is, the forming or arranging of slit points for ever-pointed pencil-cases, in the manner before described; which improvements I claim for ever-pointed pencils in general."

"The second part of my invention consists in an improvement in pen-holders." "What I claim with respect to this second part of my invention, is, the forming of holders for pens, with spring or yielding inside supports or bearings for pens, as herein described."

"The third part of my invention also applies to pen-holders."

"The fourth part also relates to pen-holders, such as are generally denominated 'Bramah Pen-holders.'"

The fifth and sixth parts of the invention were *described as relating to pens: the fifth was, the arranging the spring (de- [*383 scribing it) so as to support the ink in the pen, and at the same time to allow it to flow freely: the sixth was, "a particular mode of notching the pens."

"The seventh part of my invention relates to the construction of instruments, for marking, with a holder for the same, combined; forming an apparatus for marking many changes of dates, numbers, mottoes, letters, devices, or other marks or impressions, with the said apparatus." "What I claim in respect of this seventh part of my invention, is, the construction of an apparatus for marking, as hereinbefore described."

"The eighth part of my invention relates to the forming of instruments for marking, of such novel and peculiar shape, that several different devices, figures, letters, mottoes, &c., may be marked on sealing-wax or any other material capable of being marked or impressed with such instrument." "What I claim with respect to this eighth part of my invention, is, the forming of marking instruments of metal, glass, or other suitable material, as herein described."

The ninth, tenth, and eleventh parts of the invention, and the claims in respect thereof, related to improvements in inkstands.

For the prosecution, reliance was placed only upon the objection which addressed itself to the defendant's sixth claim, "for a particular method of notching pens," which it was insisted was old and useless.

For the defendant, it was conceded that the novelty or utility of that part of the invention could not be supported. But a disclaimer of the fifth, sixth, seventh, and eighth parts of the invention, and of the claims in respect of those parts, as mentioned in the specification, enrolled pursuant to the 5 & 6 W. 4, c. 83, s. 1,(a) was *offered in evidence: [*384 and it was insisted that the specification, being read as amended by the disclaimer, was not open to the objection urged.

(a) Which enacts "that any person who hath obtained, or shall hereafter obtain, letters-patent

The disclaimer,—of which the following is the material part,—was not enrolled until after issue joined, viz. the 23d of April, 1850 :—

“I, the said William Mill, in my said specification, did describe my said invention to consist of eleven parts : and, since the enrolment of the said specification, several parts of the said invention have come into extensive public use, whilst several other parts thereof have come but little into public use : and I have been advised that there may be some doubts whether the validity of the said letters-patent may not be injured by reason of the comparatively small extent of public utility of some parts of my said invention. For which reason, and also for the further reason that I wish to avoid the otherwise necessary expense of proving *385] them to be useful in a court of law, I wish to disclaim, and I *do hereby disclaim, all those parts of my said invention which are respectively described and claimed in the said specification as being the fifth, the sixth, the seventh, and the eighth parts of the said invention. In witness whereof,” &c.

The lord chief justice intimated a doubt whether the disclaimer was admissible in evidence, and whether it ought not to have been pleaded ; and he observed that he was bound to try the issues as joined, upon the validity of the patent at the time of joining issue. He thereupon directed a verdict for the crown upon all the issues ; reserving leave to the defendant to move to enter a verdict for him, if the disclaimer was admissible, and sufficient, when admitted, to sustain the patent.

Byles, Serjt., on a former day in this term, obtained a rule nisi accordingly.—He referred to *Perry v. Skinner*, 2 M. & W. 471,† which had been cited at the trial, and submitted, that, admitting that case to be law, it could not govern the present,—the case of a *scire facias* and of an action, standing upon totally different foundations.

Butt and *Webster* now showed cause.—The dates are material. The letters-patent were granted on the 29th of June, 1846. The specification was enrolled on the 29th of December in the same year. On the 10th of December, 1849, the *scire facias* issued. On the 7th of January, 1850, the declaration was delivered, together with a notice of objections. The pleas were delivered, and issue was joined, in Hilary term, 1850 ; and the record was entered for trial at the sittings after that term. On

for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents,—having first obtained the leave of His Majesty's attorney or solicitor-general, certified by his *flat* and signature,—a disclaimer of any part of either the title or specification, stating the reason for such disclaimer ; and such disclaimer, being filed by the said clerk of the patents, and enrolled with the specification, *shall be deemed and taken to be part of such letters-patent, or such specification, in all courts whatever* : Provided always, that any person may enter a *caveat*, in like manner as *caveats* are now used to be entered, against such disclaimer ; which *caveat*, being so entered, shall give the party entering the same a right to have notice of the application being heard by the attorney or solicitor-general : Provided also, that no such disclaimer shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer was enrolled ; but, in every such action or suit, the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters-patent have been, or shall have been, granted.”

the 6th of February, 1850, an order was obtained to postpone the trial until the sittings after Easter term; and, in the mean time, viz., on the 28d of April, 1850, a disclaimer was *entered, applicable to [*386 certain portions of the alleged invention, upon the novelty of some of which, issues had been taken. The main question is, whether, under these circumstances, the disclaimer was admissible in evidence upon the trial of those issues. The issues were joined upon the validity of the patent as it then stood: and the objections, notice of which was filed with the declaration, pursuant to the statute, and some of which objections pointed at parts of the invention to which the disclaimer applied, are incorporated with, and form part of, the issues: the declaration and the pleas throughout, refer to them. In an unreported case of the *Queen v. Thornton*, Lord DENMAN ruled that the issues, as joined, could alone be looked to. Assuming, however, that the 1st section of the 5 & 6 W. 4, c. 88, has the effect of making a disclaimer enrolled subsequently to issue joined, admissible in evidence upon the trial of a *scire facias*, the proper course of making it available clearly must be, by pleading it *puis darrein continuance*, like any other defence which arises after issue joined: and, if that course had been adopted here, the prosecutor would probably have discontinued, in which case he would not have been liable to costs. Upon suing out a *scire facias*, the prosecutor gives security for costs: if the judgment here is for the defendant, the bond will be forfeited, without any default on the part of the prosecutor. [TALFOURD, J.—The defendant could not have pleaded *puis darrein continuance*, without abandoning the other issues.] By leave of a judge, he might: it has repeatedly been done. *Perry v. Skinner*, 2 M. & W. 471, and *Stocker v. Warner*, 1 Com. B. 148 (E. C. L. R. vol. 50), are authorities to show that the disclaimer has not the retrospective effect here contended for. Lord ABINGER, in the former *case, says: “The act would be unjust, if it made a man who was [*387 acting consistently with the law at a certain time, subsequently a wrongdoer by relation. We never can presume that such was the intention of the legislature: and we are not at liberty to construe a doubtful act by any such presumption. The only argument that can be offered is, upon the proviso, which says ‘that no disclaimer shall be receivable in any action or suit pending at the time when such disclaimer was enrolled.’ We consider the sound way of interpreting that, is, that it shows the legislature did not intend to make a person a wrongdoer by relation; because it did not presume that any man would have the courage to bring an action, after he had actually disclaimed, for an infringement of a patent long before such a disclaimer was thought of. The intention of the legislature, doubtless, was, that he should not have the benefit of the disclaimer, as to infringements gone by long before such disclaimer was thought of.” [JERVIS, C. J.—If, as you admit, the prosecutor cannot have judgment on this *scire facias*, what course are

we to adopt?] The court may direct the fact of the disclaimer to be returned on the record, and leave it to the lord chancellor to deal with it as he shall see fit. *Croll v. Edge*, 9 Com. B. 479 (E. C. L. R. vol. 68), is an authority to show that the specification, as amended, would be less extensive than the title of the patent, and that the objection would be available under a plea of *non concessit*, or of no specification. [MAULE, J.—In that case, the question was one of mere construction.]

M. Smith (with whom was *Byles*, Serjt.), in support of the rule.—This is a question of evidence, and not of pleading. The 1st section of the 5 & 6 W. 4, c. 83, *enables the patentee to disclaim “any
*388] part of either the title of the invention, or of the specification, stating the reason for such disclaimer, or, with the leave of the attorney or solicitor-general, &c., to enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent; and such disclaimer or memorandum of alteration being filed by the clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters-patent, or such specification, in all courts whatever.” The words of the act hardly justify the observations of PARKE, B., in *Perry v. Skinner*, 2 M. & W. 476.† [JERVIS, C. J.—I certainly do not quite go along with my brother PARKE in his suggestion of the hardship of making a man a wrongdoer by relation, who incurs expense in taking advantage of a slip made by a patentee in describing his invention in his specification.] The disclaimer is to be given in evidence as part of the letters-patent or the specification. *Perry v. Skinner*, at all events, cannot apply to a *scire facias*. The objections filed or delivered with the declaration, are no part of the record; they are rather like particulars: they do not go up, on a writ of error, as part of the record. Then, as to the title of the patent,—the parts of the invention disclaimed being struck out of the specification, the title is not too large. The title is, “for improvements in instruments used for writing and marking, and in the construction of inkstands.” The first five claims refer to improvements in instruments used for “marking and writing,” and the last three to improvements “in the construction of inkstands.”

JERVIS, C. J.—I am of opinion that this rule must be made absolute.
*389] Two questions principally arise in *this case,—first, what is the proper construction to be put upon the 1st section of the statute 5 & 6 W. 4, c. 83,—secondly, whether the disclaimer, which amends the specification, was admissible upon the issues joined; and if so, what is its effect when admitted.

1. But for the case of *Perry v. Skinner*, I should have thought, upon reading the clause in question, that the plain and obvious intention of the legislature, was, to allow a specification to be amended at any time by a disclaimer, and to provide, that, when such disclaimer should be

perfected,—due precautions being taken by the law officers of the crown, and such terms being imposed as they in their discretion shall think right,—it should be deemed and taken to be, for all purposes, part of the original specification, except in the case of actions pending at the time of the filing of such disclaimer. If that be not the true meaning of the act, it seems to me that the proviso—"that no such disclaimer shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer was enrolled"—will be totally inoperative: because, if the construction put by the Court of Exchequer, in *Perry v. Skinner*, upon the previous words, be the correct one, then, inasmuch as the disclaimer is to be deemed and taken to be part of the letters-patent, or of the specification, only "from thenceforth,"—that is, from the time of its enrolment,—the proviso that it shall not be receivable in evidence in any action pending at the time of the enrolment, would be idle. I think, therefore, that, upon the true construction of the act, the disclaimer is to be read as part of the patent and specification, as from the time when the patent is granted. And I am warranted by my experience in these matters, in saying, that no practical injustice or inconvenience can result from this *construction. Reading the disclaimer with the specification, [*390 we find that the defendant had obtained letters-patent for three kinds of inventions, upon which, in his specification, he founds eleven different heads of claim. Some of these turn out not to be new. These the defendant disclaims: and, reading the disclaimer with the specification, it will appear that no claim is made in respect of those parts. But it is said, that, if this be so, the patent is void, for, the patent is granted for three things, and there is a specification which only covers two of them, and therefore the condition of enrolling a specification of the invention, is not complied with. It may, however, be doubtful whether the disclaimer, when carefully looked at, is limited to the specification: it adverts to an infirmity which may apply as well to the title of the patent as to the specification, and states that the patentee disclaims "all those parts of his said invention which are respectively described and claimed in the said specification as being the fifth, the sixth, the seventh, and the eighth parts of the said invention." That may be a disclaimer of the title, so far as it is applicable to those parts. But, assuming that that is not so, and that the patent now stands for the first five claims and the last three, it seems to me that the specification complies with the title. The title is, "for improvements in instruments used for writing and marking, and in the construction of inkstands:" and the specification, as amended by the disclaimer, describes improvements in instruments used in writing and marking, viz. pens and pencils, and improvements in the construction of inkstands.

2. If the patent and specification are to be read in the way I suggest, the only remaining question is, whether the disclaimer was admissible

upon the pleadings as here framed. If the objections filed on the part
 *391] of the prosecution were to be taken as part of the record, the several issues raised thereon must be tried and determined upon the specification as originally enrolled. But I think it is a mistake to say that the objections form part of the record. They are rather like particulars of demand, their object being to give the opposite party notice of the case he must come prepared to meet: they enable the plaintiff to give in evidence the specific objections he points out, and preclude him from showing any others. Then, what are the issues here? The *scire facias* sets out the patent, but not the specification. If the defendant had pleaded *non concessit*, he would have been beaten; for, the crown did in fact grant such letters-patent as mentioned in the declaration. But, upon the pleadings as they now stand, it is impossible to see what the patent is, until the specification is read. Then, if the prosecutor reads the fifth, sixth, seventh, and eighth claims, and insists that they are old or useless, the defendant has a right to say—"Read on, and you will find that I give those up by my disclaimer." And, when the whole is taken together, it will be found that the specification does not, in fact, claim as new, that which is not so.

For these reasons, it appears to me that the rule for entering a verdict for the defendant on all the issues, must be made absolute. With respect to the case of *Perry v. Skinner*, which I regret even indirectly to question, I do not think it applicable to the present case.

MAULE, J.—I also think that this rule must be made absolute. Three questions are presented for our decision,—first, as to the proper construction to be put upon the 5 & 6 W. 4, c. 83, s. 1,—secondly, whether
 *392] the disclaimer, supposing it to be generally admissible *in evidence as part of the specification, though filed and enrolled after issue joined, was admissible upon these issues,—thirdly, whether the specification, as amended by the disclaimer, is a specification which sufficiently describes the invention in respect of which the letters-patent were granted.

As to the construction of the statute, the words are clear; and they were so considered in *Perry v. Skinner*. Supposing that no inconvenience could result from a strict and literal construction of the statute, the Court of Exchequer in that case entertained no doubt that the words ought to be read as we read them. And I think, that, if the language of the section is carefully looked at, the inconvenience which the court in that case apprehended from this construction, has no foundation. The section enacts "that any person who, as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain, letters-patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents of England, Scotland, or Ireland, respectively, as the case may be,—having first obtained the leave of His Majesty's attorney or solicitor-general, &c.,

certified by his *fiat* and signature,—a disclaimer of any part of either the title of the invention, or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent.” The act, therefore, does not give the patentee an absolute and uncontrolled power to disclaim, but only subject to the discretion of the attorney or solicitor-general, who, acting as a judicial officer, is to determine whether that which is sought to be done is fit to be allowed, regard being had to the rights and interests of the public. *The power to disclaim being thus given, the legislature go on to provide that “such disclaimer or memorandum of alteration,”—[*398 that is, subject to the allowance of the attorney or solicitor-general,—“being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters-patent, or such specification, in all courts whatever.” It then imposes a further restriction upon the rights of the grantee,—“Provided always, that any person may enter a *caveat*, in like manner as *caveats* are now used to be entered, against such disclaimer or alteration; which *caveat*, being so entered, shall give the party entering the same, a right to have notice of the application being heard by the attorney or solicitor-general, or lord advocate respectively.” I consider, therefore, we are bound by the words of the act, to deal with the disclaimer as part of the specification, as from the date of the specification, though enrolled subsequently. That this is the true construction, is proved, I think, by some words which follow:—“Provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was enrolled; but, in every such action or suit, the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters-patent have been or shall have been granted.” If there were any doubt upon the earlier part of the section, these latter words, I think, would clear it up; for, they show manifestly, that, with respect to the alternative not provided for, viz., when the disclaimer is *not* entered pending an action or suit, then that shall happen, which, but for the proviso, would have happened in a pending suit; or, in other words, that this clause of the act, in *providing that the disclaimer shall not be received in evidence in any action or suit [*394 pending at the time of its enrolment, shows that, but for this proviso, the amended, and not the original, title and specification would, in such unprovided case, have been deemed and taken to be the title and specification of the invention for which the letters-patent were granted. I feel no sort of difficulty or doubt in putting this construction upon the words used by the legislature. This, then, being the literal sense of

the words used, let us see whether in this case we are bound to put a different construction upon them, on the ground of inconvenience. This is the case of a *scire facias*, where an individual takes upon himself the duty of a public prosecutor, and, as such, questions the validity of the patent. The statute recognises that there may be a patent for a meritorious invention, as to the validity of which difficulties may arise, upon the application of the provisions of the patent law. It was to exempt parties from the strict consequences of some slip, and to prevent them from having their letters-patent thereby rendered altogether unavailing, that this statute was passed. The bringing a *scire facias* supposes the patent to have some vice in it; though the patentee, by reason of the novelty and utility of his invention, may be a benefactor to the public, and therefore a fit person to be protected. The prosecutor here does not affect to say that the letters-patent ought to be cancelled: all he wants is, to save himself from the consequences of the bond he has given to secure the costs, in the event of his failing to avoid the patent. As soon as the disclaimer is entered, all that the prosecutor seeks, viz., the rectifying a bad patent, is attained: he has *confitemur*: a

*395] good patent is substituted for the bad one. The bond for costs is a matter over which the attorney-general or the *Master of the Rolls will exercise a jurisdiction: and we must assume that that jurisdiction will be exercised properly and discreetly. It is conceded, that, if the Master of the Rolls amends the specification,—as he undoubtedly may,—the specification speaks from the amendment. I must confess I do not see that any such injustice will arise as the Court of Exchequer seem to have apprehended in *Perry v. Skinner*. The principle of the enactment seems to be this: where a patent is void for claiming too much, and the case is one which appears to the attorney-general to be proper for the exercise of his discretion in allowing a disclaimer, the patent is not to be altogether avoided, but may be amended in the mode prescribed. In the exercise of this discretion, great care ought to be, and no doubt is, taken that injustice be not done to third persons, or to the public. The spirit of the act seems to be this,—that, where there are objections that go only to a small and insignificant part of a patent, which, if sustained, would defeat it altogether, the patentee may relieve himself from the difficulty by a disclaimer. Then, inasmuch as a party against whom an action may have been brought for an infringement, may, by means of such disclaimer, be deprived of a good defence, that difficulty is met by the proviso. But, in the case of a *scire facias*, the proviso not applying, the general spirit of the enactment prevails, which is, that, where a disclaimer has been allowed by the competent authority, and has been duly enrolled, it is to have the same validity as if it had formed part of the original specification. In *scire facias*, the patentee is passive. The prosecutor complains of the badness of the patent: all he wants is, that it may be cancelled or amended: and that may be a

sufficient reason for excepting the case of a *scire facias* out of the proviso. The only injustice that can be suggested *in this case, is, [396 as to the costs. The law does not take such care of costs as the parties sometimes expect: but I do not think that, under the circumstances of this case, is any inconvenience. In the present case, the costs form no part of the judgment: if they are to be got at all, it must be by a proceeding in which they will be awarded according to the justice of the case.

2. As to the admissibility of the disclaimer upon the issues joined, it seems to me to be quite clear, that, upon the issues of novelty and utility, it was necessary and proper to put in the disclaimer as part of the specification; and also upon the issue as to the proper description of the invention in the specification.

3. And, as to the title of the patent,—comparing it with the specification and the disclaimer, I think we can see enough to show that there is no variance.

WILLIAMS, J.—I am of the same opinion. The statute 5 & 6 W. 4, c. 83, s. 1, requires us, in plain and unambiguous language, to take the disclaimer as part of the specification: and, unless we decline to obey that plain direction, I think we cannot help saying that this disclaimer was admissible evidence upon the issues joined in this case.

The next question is, what was the effect of the disclaimer when admitted. The effect is, that the specification and the disclaimer, reading the whole together, claim nothing the novelty or the utility of which is denied. Surely, then, the defendant is entitled to have the issues found for him. It is said that we shall be doing injustice to the prosecutor by this construction of the statute, inasmuch as it may have the effect of rendering him liable upon his bond for the costs of the defence. It is admitted that the patent cannot be cancelled. When the prosecutor had notice of the *disclaimer, he had notice that his further [397 prosecution of the *scire facias* was rendered useless. He should then have given notice to the defendant that he would not proceed further; and then he might with some reason insist that it would be contrary to justice that the bond should be put in suit. No doubt, the person in whose discretion the question whether or not the bond shall be enforced, will see that justice is done between the parties.

TALFOURD, J.—I am of the same opinion. The case has been so fully gone into by my lord and my learned brothers, that I cannot usefully add anything. It has been said that the disclaimer should have been pleaded *puis darrein continuance*. I do not well see how that could have been done. I cannot conceive any possible objection to the disclaimer being received in evidence upon the issues as they stood; and, being admissible, I think it clearly entitled the defendant to the verdict.

Rule absolute.

*398] *DIXON and Others, Assignees of JOHN BOYD and JAMES BOYD, Bankrupts, v. STANSFELD and Others. Nov. 9.

A factor can only claim a lien for his general balance, upon goods which come to his hands as factor.

A. & Co., who carried on business at Hull, as merchants, factors, ship and insurance brokers, and general agents, had had various dealings, as factors, with B. & Co., of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co., requesting them to get a policy of insurance effected for them on the ship *Exporter*, for a voyage from the Downs to South America, and thence to the West Indies. A. & Co. procured the insurance to be effected, and B. & Co. remitted them the premiums,—the policy remaining in the hands of A. & Co.:—Held, that A. & Co. were not entitled to hold the policy as a lien for the general balance due to them, as factors, from B. & Co.

THIS was an action of detainue, brought by the plaintiffs, as assignees of John Boyd and James Boyd, bankrupts, against the defendants, to recover possession of a certain policy of insurance, dated the 3d of November, 1845, effected by William Henry Wilson and Richard Vause, in their own names, and, as alleged in the declaration, as agents for and on behalf of the said John Boyd and James Boyd, with certain underwriters at Glasgow, on a certain vessel called the *Exporter*, for a sum of 1000*l.*, for a certain voyage to the East coast of South America.

The defendants pleaded, that, previously to, and at the time of, the respective bankruptcies of the said John Boyd and James Boyd, and W. H. Wilson and R. Vause, and before the said detention, the said W. H. Wilson and R. Vause carried on in copartnership the trade and business of merchants, insurance-brokers, agents, and factors, at Kingston-upon-Hull, under the style and firm of Wilson & Vause, and that, previously to, and at the time when the said policy of insurance was effected, the said John Boyd and James Boyd were accustomed to deal with the said W. H. Wilson and R. Vause; that mutual accounts then existed *399] between them, and that, *whilst such mutual dealings and accounts existed, and before either of the said bankruptcies, the said W. H. Wilson and R. Vause effected the said policy, pursuant to an order given for that purpose by the said John Boyd and James Boyd; that the policy remained in the possession of the said W. H. Wilson and R. Vause until their bankruptcy, and afterwards in that of the defendants as their assignees; that the said W. H. Wilson and R. Vause became bankrupts, and the defendants were duly appointed their assignees; that, at the time of the said last-mentioned bankruptcy, the said John Boyd and James Boyd were indebted to the said W. H. Wilson and R. Vause, on the general balance of accounts between them, in the sum of 7486*l.* 19*s.* 4*d.*; that, at the time of the said bankruptcy, nothing was due for or on account of the premiums for effecting the said policy of insurance, or for or on account of any premiums paid on effecting any other policy of insurance; that, by the usage and custom of merchants, the said W. H. Wilson and R. Vause had, at the time of their said bankruptcy, a lien,

to the extent of their said debt of 7436*l.* 19*s.* 4*d.*, upon the said policy in the declaration mentioned, and were entitled to retain the same until such lien was satisfied; and that such debt was, at the time of the said detention, unpaid and owing to the defendants as such assignees of the said W. H. Wilson and R. Vause.

The plaintiffs—admitting that the said W. H. Wilson and R. Vause became bankrupts, and the appointment of the defendants as their assignees,—replied, *de injuriâ*.

The cause came on to be tried before WILDE, C. J., at the sittings in London, after Trinity term, 1849, when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

This is an action brought by order of the court of review in bankruptcy, whereby it was ordered, that the *said assignees of the estate and effects of the said bankrupts John Boyd and James Boyd, should forthwith commence an action in the Court of Common Pleas, for the purpose of ascertaining the right of the assignees of the estate of the said bankrupts W. H. Wilson and R. Vause, to retain possession of a certain policy of insurance (being the policy in the said declaration mentioned, and in the said order described as) bearing date on or about the 3d of November, 1849, effected by them, the said W. H. Wilson and R. Vause, in their own names, as insurance-brokers, and, as alleged by the assignees of the said W. H. Wilson and R. Vause, as factors for and on behalf of the said John Boyd and James Boyd, with certain underwriters at Glasgow, for the sum of 1000*l.*, on the said ship or vessel called the *Exporter*, then the property of the said John Boyd and James Boyd, but since lost at sea, valued, as therein mentioned, at the sum of 4000*l.*, for the voyage to the East coast of South America: And it was thereby further ordered, amongst other things, that, upon the trial and hearing of such action, for the purposes of the said action, the said assignees of the estate of the said W. H. Wilson and R. Vause should admit that nothing was due or owing to them for or on account of the premiums paid on effecting the said policy for 1000*l.*, or for or on account of any premiums paid on effecting any other policies of insurance by the said W. H. Wilson and R. Vause for or on behalf of the said John Boyd and James Boyd. [400]

The said John Boyd and James Boyd were, previously to their said bankruptcy, hop, seed, and guano merchants, carrying on business in the borough of Southwark, under the style of John Boyd & Co. They were also the owners of several vessels employed in the guano trade, and, amongst others, of the said vessel called the *Exporter*.

*The said John Boyd and James Boyd were adjudged bankrupts under a *fiat* against them, dated the 25th of May, 1846. [401]

The said W. H. Wilson and R. Vause were adjudged bankrupts under a *fiat* issued against them, dated the 15th of April, 1846.

The said W. H. Wilson and R. Vause, previously to their said bankruptcy, were, as before stated, factors for and on behalf of the said John Boyd and James Boyd, with certain underwriters at Glasgow, for the sum of 1000*l.*, on the said ship or vessel called the *Exporter*, then the property of the said John Boyd and James Boyd, but since lost at sea, valued, as therein mentioned, at the sum of 4000*l.*, for the voyage to the East coast of South America: And it was thereby further ordered, amongst other things, that, upon the trial and hearing of such action, for the purposes of the said action, the said assignees of the estate of the said W. H. Wilson and R. Vause should admit that nothing was due or owing to them for or on account of the premiums paid on effecting the said policy for 1000*l.*, or for or on account of any premiums paid on effecting any other policies of insurance by the said W. H. Wilson and R. Vause for or on behalf of the said John Boyd and James Boyd.

ruptcy, carried on business as merchants, factors, ship and insurance-brokers, and general agents, at Hull, under the style of Wilson & Vause. They acted at Hull as the agents and factors of the said John Boyd & Co., with respect to several guano speculations.

With the exception of one isolated transaction in 1844, the general business between John Boyd & Co. and Wilson & Vause began in January, 1845. Their first dealing consisted of the purchase of guano by Wilson & Vause, to a large amount, for John Boyd & Co.; which guano Wilson & Vause were also employed to sell. No specific arrangement was made as to the commission to be paid to Wilson & Vause. Other dealings of the like kind took place, and continued until the 15th of April, 1846, when Wilson and Vause became bankrupts. At that time, there was a balance due from John Boyd & Co. to Wilson & Vause, in respect of the said dealings, amounting to 6798*l.* 10*s.* 11*d.*

There were only two instances in which Wilson & Vause effected insurances for John Boyd & Co., besides that which forms the subject of this action, viz. one policy of insurance against fire, effected by Wilson & Vause on the 23d of April, 1845, upon property of John Boyd & Co., which was in the possession of Wilson & Vause, at Hull, for the purpose of sale; and the other, a marine policy, effected on the 1st of July, 1845, on guano which had been in the possession of Wilson & Vause at Hull, but belonged to John Boyd & Co., and which had been
*402] sold by Wilson & Vause to a customer *at Newcastle-upon-Tyne, to be delivered there; and the policy was effected against the risk of the voyage from Hull to Newcastle. Wilson & Vause paid the premiums on these policies; and the amounts were debited to John Boyd & Co., in the account current which accompanied, and formed part of, the case.

The said John Boyd & Co. were owners of a vessel called the *Exporter*; which vessel, in October, 1845, was sent by them to the coast of South America for the purpose of obtaining a cargo of guano. They applied to Wilson & Vause to effect a policy on that vessel for that voyage.

There were but few underwriters at Hull; and one insurance company, who insured to a small extent. Wilson & Vause not being able to effect the policy required at Hull, applied to Douglas & Co., insurance brokers at Glasgow, to get the order completed there. Wilson & Vause debited John Boyd & Co. with 52*l.* 5*s.*, the full amount of the premium; but Douglas & Co. allowed Wilson & Vause 2½ per cent.

The following is the correspondence relating to the transaction:

October 28, 1845, Boyd & Co. to Wilson & Vause:—"Please insure on the bark *Exporter*, A. 1, about 214 tons, Southampton built, and coppered last year, 1000*l.* on ship, &c., valued at 4000*l.*, from the Downs and island or islands or mainland and East coast of South America. We have done 700*l.* from London, at 40*s.*, at Lloyds', but cannot get

more done; therefore we try elsewhere. She was reported in the Downs to-day."

Hull, October 29, 1845, Wilson & Vause to Boyd & Co.:—"Not being able to do any insurance here on the Exporter, we have ordered it through our Glasgow brokers, the vessel having sailed. We have done our Hull vessels the same round; and have no doubt shall hand you copy of policy for yours. Why not insure *out and home? How [403 are you covered, if lost in loading?"

Hull, October 29, 1845, Wilson & Vause to Douglas & Co.:—"The owners of the following write us—'Please insure on the bark Exporter, A. 1, 214 tons, Southampton built, and coppered last year, 1000*l.* on ship, valued at 4000*l.*, from the Downs or island or islands or mainland East coast of South America' (reported in the Downs yesterday). Part is done at 40*s.* at Lloyds'. As we are unable to do anything here, we forward above to you, and are waiting policy."

Glasgow, October 31, 1845, Douglas & Co. to Wilson & Vause:—"We have your favour of the 29th, and regret that our underwriters decline insuring the Exporter for the voyage mentioned, to island or islands or mainland East coast of South America, on account of the difficulty which must arise in determining when the risk terminates. There are but two ways in which they would be willing to take her,—either for twelve months, at 8 guineas per cent., or for the voyage out and home, at 5*l.* 10*s.* per cent.,—which are the rates which have been paid on other equally good vessels. Should either of these modes of insurance meet the views of your friends, we shall be glad to hear from you on the subject."

October 30, 1845, Boyd & Co. to Wilson & Vause:—"Should you not have insured the Exporter, do so from the Downs for island or islands of East coast of South America, thence with guano to Dominica, West Indies."

Hull, October 31, 1845, Wilson & Vause to Boyd & Co.:—"We ordered the amended insurance per Exporter."

Hull, October 31, 1845, Wilson & Vause to Douglas & Co.:—"Please alter the Exporter's insurance, to the *islands, and thence to [404 Dominica, West Indies, on best terms in your power."

Hull, November 3, 1845, Wilson & Vause to Boyd & Co.:—"Our friends say, 'Our underwriters decline, &c.' (as in the letter of Douglas & Co. of the 31st of October). In reply to this, we this post write them to do it 'Collooney Island and for places adjacent;' such being the wording of the policies we have done some rounds; and expect they will hand in policy."

Hull, November the 3d, 1845, Wilson & Vause to Douglas & Co.:—"Yours of the 31st ult. to hand. We are surprised you were not able to do the Exporter. We have before us policy per Adele (not so good a ship), Hull to Rio, while there, and thence to Collooney Island and

other places adjacent, while there, and thence to U. K., at 5 guineas, signed by D. Forrest, for several of your underwriters; also by U. Ewing, G. G. Wilson, and J. Watson. We know, too, that several vessels are done at same rate, *via the Plate* and other places. As the Exporter goes direct, you ought to be able to do her to the coast, Dominica, and U. K., at 5 guineas, or only to Dominica at something less: the risk cannot be so great. The vessel having sailed, we leave you to do the best you can,—the same as if the vessel was your own. You know our position."

Glasgow, November 3, 1845, Douglas & Co. to Wilson & Vause:—"In accordance with your order of the 31st ult., we have effected insurance for 1000*l.* on the Exporter, to the East coast of South America, and thence to Dominica: premium, 5*l.*, below which we could not succeed; and hope that rate will be considered moderate. Enclosed is a copy of policy."

Hull, November the 5th, 1845, Wilson & Vause to Douglas & Co.:—"We have before us your esteemed favour of the 4th instant, with policy per Exporter."

Hull, November 5, 1845, Wilson & Vause to Boyd * & Co.:—"405] "Enclosed is policy for 1000*l.* per Exporter, at 5*l.*, the very lowest we could effect it at. We pay cash, less 10 per cent., allowing you 7½. If you remit, it will square the transaction, and save entry. We dare say we can get a further sum done, if you are not covered."

November 6, 1845, Boyd & Co. to Wilson & Vause:—"Your esteemed is duly received; and, with regard to the insurance of the Exporter, we shall remit you the amount of the premium within the month, which we understand is the usual time allowed for cash payments."

Hull, December 6, 1845, Wilson & Vause to Boyd & Co.:—"Please send us money for the Exporter's insurance."

Hull, December 8, 1845, Wilson & Vause to Douglas & Co.:—"Enclosed we beg to hand you seven days' bill for 62*l.* 6*s.*, amount of last month's insurance."

Hull, December 10, 1845, Wilson & Vause to Boyd & Co.:—"Please send us the insurance per Exporter. We remitted the Glasgow people for it."

December 11, 1845, Boyd & Co. to Wilson & Vause:—"We will remit you the premium on the Exporter to-morrow."

Hull, December 19th, 1845, Wilson & Vause to Boyd & Co.:—"You have not remitted us for the Exporter's insurance yet."

Hull, December 22, 1845, Wilson & Vause to Boyd & Co.:—"You have not sent us the insurance on the Exporter."

Hull, December 24, 1845, Wilson & Vause to Boyd & Co.:—"We are still without insurance of Exporter."

April 16, 1846, Boyd & Co. to Wilson & Vause:—"Misfortunes, seemingly, never come alone. No doubt, ere this you have heard of

our loss of the Exporter, by the prominent feature she acted in the loss of so *many ships off Patagonia, as received by yesterday's account." [*406]

Hull, April 17, 1846, Wilson & Vause to Boyd & Co.:—"We saw the loss per Exporter. Shall we give notice to the underwriters, as to the 1000*l.* effected on her?"

April 18, 1846, Boyd & Co. to Wilson & Vause:—"Regarding the Exporter, we cannot, under the present circumstances, answer your question."

The policy remained in the hands of Douglas & Co., as the agents of Wilson & Vause, until the 18th of April, 1846; on which day it was transmitted to the last-mentioned firm; that which was enclosed in the letter of the 5th of November, 1845, having been only a copy, and not the original policy.

Several of the bills of exchange drawn by John Boyd & Co., and accepted by Wilson & Vause, and appearing on the debtor side of the account which accompanied the case, were so accepted by Wilson & Vause by way of advance.

It was admitted, that, at the time of Wilson & Vause's bankruptcy, nothing was due to them in respect of premiums paid on effecting the said policy, or any other policy of insurance.

The court was to be at liberty to draw inferences of fact.

The question for the opinion of the court, was, whether the plaintiffs were entitled to recover in this action. If so, the verdict found for the plaintiffs was to stand. If not, the verdict was to be entered for the defendants.

Hugh Hill, for the plaintiffs.—It is difficult to understand what the plea means,—whether it is intended to set up the lien as an allegation of fact, or as a conclusion of law. The case states that Wilson & Vause acted as *factors or agents of Boyd & Co. There is no instance of their [*407] having acted as insurance-brokers for Boyd & Co., save in regard to the policy now in question. It may be contended on the other side, that, if Wilson & Vause were insurance-brokers,—although nothing was done by them in that character in respect of this or of any other policy,—they are still entitled to set up a general lien upon the policy, to cover any debt that may be due to them from Boyd and Co. on other transactions: or it may be said that this is an allegation of fact, and that, as the case states they did act as factors or agents, the general lien as factors attaches upon this policy, although effected by them as insurance-brokers. They claim to hold it in respect of their general lien as factors. Where a party claims a lien upon a specific chattel, it must have come to him in the course of the employment in respect of which he claims the lien. As, in the case of an attorney claiming a lien upon deeds, they must have come to his hands in the character of attorney: *Stevenson v. Blakelock*, 1 M. & Selw. 535. So, in the case

of a factor, the goods upon which he claims a lien, must have come to his hands *as factor*: *Drinkwater v. Goodwin*, Cowp. 251. If a merchant abroad writes to a factor in England, and requests him to purchase him a service of plate, the latter cannot claim to hold the plate for his general balance in respect of mercantile dealings between them. *Stevenson v. Blakelock* is a distinct authority to show that the subject of the lien must come to the hands of the party in the course of the particular employment in respect of which the lien is claimed. No *particular* lien is, or could be, set up here.

Wordsworth, *contra*.—This is, in effect, the case of *Olive v. Smith*, 5 Taunt. 56 (E. C. L. R. vol. 1). *Wilson & Vause* were the general agents *of Boyd & Co.: at all events they were acting, and are recognised as having acted, in four different capacities, viz. as merchants, factors, ship and insurance-brokers, and general agents. If the plaintiffs had intended to rely upon any rule of law exclusively applicable to one of these characters, the case should have given the defendants some notice of it. *ABBOTT*, C. J., in a case somewhat similar in this respect to the present, *Baring v. Currie*, observes: (a) “In what situation did the defendants stand in respect to *Coles & Co.*, and what did they omit to do? They knew that *Coles & Co.* acted both as brokers and merchants; and, if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether, in this transaction, they acted as brokers or not: but they make no inquiry.” Here the case states that *Wilson & Vause* were employed by *Boyd & Co.* to purchase guano for them: and it in substance finds that the policy on the Exporter was effected in relation to a subject in which they were dealing for *Boyd & Co.*, viz. the purchase of guano. The account-current contains many items ranging from June, 1845, to April, 1846, which appear to relate to cash advanced, and acceptances given, in anticipation of these cargoes of guano. If *Wilson & Vause* were dealing as factors or general agents for *Boyd & Co.*, and had a balance against them, they are clearly entitled to hold any property coming to their hands for such general balance: *Kruger v. Wilcox*, *Ambler*, 252. (b) Lord Chancellor *HARDWICKE* there says: “All the four merchants, both in their examination in the cause, and now in court, agree, that, if there is a course of dealings *and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well as for the charges, customs, &c., paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account.” [*MAULE*, J.—That does not advance

(a) 2 B. & Ald. 144.

(b) “Before this case, it was certainly *doubtful* whether a factor had a lien, and could retain, for the balance of his general account.” Per Lord *MANSFIELD*, in *Green v. Farmer*, 4 Burr. 2218.

your argument much.] *Man v. Shiffner*, 2 East, 523, applies very closely to the present case. There, one Heath, a planter in Jamaica, for a valuable consideration in money paid to him by one Allen, as agent to the plaintiff and one Parkinson, drew bills of exchange on Atherton & Astley, of Liverpool, the merchants of Heath, in favour of the plaintiff and Parkinson, which Atherton & Astley refused to accept (not having in their hands funds of the drawer, Heath), and the same were returned. The share of Parkinson in these bills was afterwards paid; and, on the 18th of July, 1800, Heath shipped, in Jamaica, on board the *Hero*, Captain Lightfoot, for Liverpool, twenty-five tierces of sugar, to be delivered to the order of the shipper, for which Captain Lightfoot signed a bill of lading, and upon which bill of lading, delivered by Heath to Allen, the following endorsements were made. "Captain Lightfoot. Sir,—If Atherton & Astley will engage to pay the net proceeds of the within-mentioned twenty-five tierces of sugar to the order of W. Allen, you will, in that case, deliver them to the said Atherton & Astley: but, if they do not so engage, &c., you are then to deliver the same to the order of the said W. Allen, who is entitled and hereby authorized to recover and receive the amount insured on the same, in case of loss; having received value for the same this 19th day of July, 1800. R. Heath." "To Captain *Lightfoot. Sir,—If Atherton & Astley engage to pay the net proceeds of the within-mentioned [*410 twenty-five tierces of sugar to L. Parkinson, or his order, you will in that case deliver the said sugar to the said Atherton & Astley; otherwise, you are to deliver them to the order of the said L. Parkinson; value received of him in Jamaica, 23d of July, 1800. W. Allen." "I hereby assign, transfer, and set over to James Man, pursuant to the directions of W. Allen, all the right, title, property, and interest vested in me to the within bill of lading, and to the contents, by virtue of the above endorsement from the said W. Allen to me. 18th March, 1801. L. Parkinson." Allen transmitted the bill of lading, with the two first endorsements thereon, to Parkinson, for the use of himself and the plaintiff; and, when Parkinson had received the money due to him from Heath, he made the third endorsement on the bill of lading, and delivered it to the plaintiff. Before the sugars were shipped, viz. on the 17th of June, 1800, Heath wrote a letter to Atherton & Astley, in which, after noticing his engaging so many tierces by the ships *Hero* and *Bacchus*, their delay in sailing, and the uncertainty of the crops, &c., he directs them to "insure by ship or ships at and from Montego Bay, as interest may appear." In consequence of this letter, Atherton & Astley wrote to the defendants, as follows:—"Messrs. Shiffner & Ellis, Liverpool. 2d September, 1800. Please to insure 1000*l.* on sugars, as interest may appear, valued at 20*l.* per hogshead, on ship or ships at and from Jamaica to Liverpool, on account R. Heath. The *Hero* and the *Bacchus* are mentioned as likely to have most of the property

on board." In pursuance of this letter, the defendants, as agents, caused the insurance to be made in the same terms as directed; which policy had ever since remained in their possession. The ship *Hero* *411] sailed from Jamaica in January, 1801, and was lost on the 12th of February. After the loss, the plaintiff, being then possessed of the bill of lading, tendered to the defendants the premium paid on effecting the policy, and demanded the policy of them, which they refused to deliver. And, after he had discovered that the underwriters had paid the loss to the defendants, he demanded of them the money which they had so received, but which they refused to pay. At the time the insurance was ordered, and also when it was effected, Heath was the debtor of Atherton & Astley, as his merchants and factors, to a larger amount than the sum insured; and the defendants, as the insurance-brokers of Atherton & Astley, were their creditors to more than the sum recovered upon the said policy; which debts remained unsatisfied: and the reason assigned by the defendants for retaining the policy, and the sum recovered thereon, when the same were demanded by the plaintiff, was, that Atherton & Astley were creditors of Heath, and debtors to the defendants; and the defendants insisted they had a lien upon the policy, and the money recovered thereon, for the balance due to them by Atherton & Astley, which balance exceeded the sum recovered from the underwriters. On the 1st of January, 1801, Atherton & Astley stopped payment. Upon a case stated for the opinion of the court, Lord ELLENBOROUGH delivered the judgment of the court in favour of the defendants. Their opinion, he observed, "was not founded on any right which the defendants had to retain the policy from the plaintiff on the ground of having a lien on it to satisfy their claim on Atherton & Astley, but considering them as the servants of Atherton & Astley, who were entitled to hold the policy as against the plaintiff, who claimed from Heath, the consignor, until their claim on Heath was satisfied on the score of their general *412] balance. The case, he added, *had been obscured by bringing forward the defendants' lien, instead of that of Atherton & Astley, in whose hands the policy was to be considered as in effect remaining. Then, as the plaintiff could only have recovered the policy out of the hands of Atherton & Astley, by satisfying their lien, so the same lien attached on the proceeds of that policy recovered from the underwriters; and, as that lien exceeded the plaintiff's demand, the defendants, as servants of Atherton & Astley, were entitled to retain the whole in this action." [MAULE, J.—If it had appeared that the Exporter was consigned to Wilson & Vause, as agents to sell the cargo on behalf of Boyd & Co., that case would have been applicable. There, the policy was a document connected with the property in the cargo, which cargo was on its way to the defendants as factors for sale. They, therefore, would necessarily hold the policy in the same character as they held the goods, viz. as factors. The plaintiffs say that the policy did not come to the

hands of Wilson & Vause as factors, but as insurance-brokers only. It certainly seems somewhat remarkable that Wilson & Vause should be so repeatedly applying to Boyd & Co. for a remittance of the premium on this policy. Importunity for 50*l.* is rather curious, considering the large sums which the account-current shows to have been passing through their hands.] The object was, as is stated in Wilson & Vause's letter of the 5th of November, 1845, that the transaction might be squared. In *Olive v. Smith*, 5 Taunt. 56 (E. C. L. R. vol. 1), A., a merchant, employed B., a broker, to effect policies and sell goods, and trusted him with the possession of the policies. A. being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those *goods to the exclusion of C.'s general credit, became bankrupt. Afterwards, a loss happened, and B. received the money from [*413 the underwriters: and it was held that this was a mutual credit within the 5 G. 2, c. 30, s. 28, and that B. might retain the sum received for the loss, in liquidation of his advances, as well as for the balance due for premiums. [*H. Hill.*—The general doctrine laid down in that case was very much qualified in the subsequent case of *Rose v. Hart*, 8 Taunt. 499 (E. C. L. R. vol. 3). That was an action of trover for cloths deposited by a bankrupt, previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed: and it was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for, that there was no mutual credit within the statute 5 G. 2, c. 30, s. 28. MAULE, J.—If there was mutual credit at the time of the bankruptcy, the commissioners were to take the account, and strike a balance. That was afterwards extended to contingent and future debts. How could the commissioners, in *Olive v. Smith*, take this money into account? At the time of the bankruptcy, no loss had happened. It is in respect of that, I think, that *Olive v. Smith* has been overruled. Speaking of these two cases, in *Young v. The Bank of Bengal*, 1 Moore's Indian Appeal Cases, 87, 148, Lord BROUGHAM says: "In *Olive v. Smith*, a broker had been allowed to set off a debt antecedently due from his employer, against the losses recovered from the underwriters on policies deposited in his hands. In *Rose v. Hart*, the court held that such a set-off is only competent to the pawnee, in cases where the thing alleged to be a giving of credit, either constitutes a present cross debt, or *must* end in one. This *limitation of the case of *Olive v. Smith* has in [*414 subsequent cases(a) been approved and followed." The contingency must be one that is susceptible of calculation.] The plaintiffs must make out that the effecting this policy, was an act done by Wilson & Vause exclusively in the character of insurance-brokers. [TALFOURD,

(a) *Sampson v. Burton*, 2 B. & B. 89, 4 J. B. Moore, 551 (E. C. L. R. vol. 16), *Rose v. Sims*, 1 B. & Ad. 521 (E. C. L. R. vol. 20).

J.—It is for the defendants to establish their lien.] It is not pretended that the former policies were effected by Wilson & Vause as insurance-brokers: but it may fairly be inferred from the facts which are stated, that they were effected by them as factors. [MAULE, J.—The terms of the policy are not set out. Was it one upon which Wilson & Vause alone could have sued?] The case states that they effected the policy in their own names. It does appear that the former policies were so effected. [MAULE, J.—There is, in truth, but one other instance of a marine policy being effected by Wilson & Vause on behalf of Boyd & Co. You cannot make a course of dealing out of one instance.] A factor is entitled to insure the goods of his principal. [MAULE, J.—It is difficult to discover from the statement of the case, what is the precise question upon which the opinion of the court is sought to be obtained.]

It was afterwards agreed that the following should be taken to be the questions intended to be submitted to the court:—

“1. Did Wilson & Vause effect the policy of insurance in the declaration mentioned, as the *factors* of John Boyd & Co., or was the policy effected by Wilson & Vause as *insurance-brokers* for the said John Boyd & Co.:

“2. If the policy was effected by Wilson & Vause as *insurance-brokers* for the said John Boyd & Co., had *Wilson & Vause, at the time *415] of their bankruptcy, a lien on the policy for the general balance of account due to them as *factors* from John Boyd & Co.

“If the court shall be of opinion that Wilson & Vause did not effect the policy as the *factors* of John Boyd & Co., and that, at the time of their bankruptcy, Wilson & Vause had not a lien on the policy for the general balance of account due to them from John Boyd & Co., the verdict found for the plaintiffs to stand; otherwise, the verdict to be entered for the defendants.”

Wordsworth, continuing.—[JERVIS, C. J.—The amended questions show that it is a case of *lien* only that is set up, and not *mutual credit*. *H. Hill*.—Exactly so.] There is nothing stated in the case to warrant an inference that Wilson & Vause acted as insurance-brokers: it must be assumed that this policy was effected by them as incident to their character of factors. In *Story on Agency*, § 111, it is said: “The question has often been discussed, whether factors, or consignees for sale, have an implied authority to insure for their principal; for, there cannot be a doubt that they may insure upon their own account to the extent of their own interest. The general doctrine now established, is, that they may insure both for themselves and for their principal. But they are not positively bound to insure, unless they have received orders to insure, or promise to insure, or the usage of trade, or the habit of dealing between them and their principals, raises an implied duty to insure. They may insure in their own names, or in the name and for the benefit of the principal. If they insure in their own name only, they may, in

the case of loss, recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest, will be a resulting trust for the benefit of their principals." It is clear, therefore, *that it was the duty of Wilson & Vause, as *factors*, [416 to insure the cargoes of guano sold by them for Boyd & Co. at Hull, to be shipped to other places. In what respect does the policy now in question differ from those? It must be conceded that an insurance-broker has no general lien, beyond the amount due to him for premiums and commission in that character. [TALFOURD, J.—Then you concede the second question.] Not altogether: it is mixed up with claims of another character, in respect of which also there is a general lien. [JERVIS, C. J.—How mixed up?] By all being blended in one account.

Hugh Hill, in reply.—There is no pretence for saying that the policy in question was effected by Wilson & Vause, as *factors*. All that the authorities referred to establish, is, that a factor has authority to insure goods that are consigned to him for sale. Besides this policy, the case only gives two instances of insurances by Wilson & Vause on account of Boyd & Co.: the first was, an insurance against fire, on goods of Boyd & Co. in their hands as factors; the second was, a marine policy on goods which had been sold by them as factors, and shipped by them for Newcastle. But, with respect to the policy on the ship *Exporter*, all presumptions are excluded by the facts which are stated. It was not a policy on goods in the hands of Wilson & Vause, or which were coming to their hands: it was a policy on the voyage out. Wilson & Vause carried on business as insurance-brokers, and had a profit, as such, upon this policy. The correspondence treats the matter as an isolated transaction, which is to form no part of the general dealings between the parties.

JERVIS, C. J.—I am of opinion that the plaintiffs in this case are entitled to the judgment of the court. *By the agreement of the parties, two questions have been presented for the opinion of the [417 court, both of which, by the admission of the counsel for the defendants, practically resolve themselves into a question of fact. The action is in detinue for a policy of assurance, to which the plaintiffs are clearly entitled, unless the defendants can establish a right of lien on the part of Wilson & Vause, by whom the policy was effected. Upon the facts stated in the case, I think there can be no doubt whatever that the policy was effected by Wilson & Vause in the character of insurance-brokers, and of insurance-brokers only. The case states that they filled four different characters, viz. those of merchants, factors, ship and insurance-brokers, and general agents. There had been large transactions between them as factors, and Boyd & Co.; and, besides the transaction in question, there had been two cases of insurances—but, whether in those instances the policies had been effected by Wilson & Vause as

factors or as insurance-brokers, does not appear. It is clear, that, in those two instances, they would have had the right to insure in their character of factors. The statement of the case, therefore, leaving the matter thus uncertain, we must see what can be gathered from the correspondence which is set out: and, looking at that, it plainly appears that Wilson & Vause were employed to effect this policy in their character of insurance-brokers. Boyd & Co. write to them on the 28th of October, 1845, requesting them to insure 1000*l*. on the Exporter. Not being able to effect the insurance at Hull, Wilson & Vause, on the following day, write to Douglas & Co., at Glasgow, to get it done there. Nobody can doubt that that was a transaction in which they were employed as insurance-brokers. If that be so, it seems to be conceded that Wilson & Vause could have no general lien for the balance due to them as *factors. A man is not entitled to a lien simply because *418] he happens to fill a character which gives him such a right, unless he has received the goods, or done the act, in the particular character to which the right attaches. There is no evidence of usage, or course of dealing between the parties, to justify the claim of a general lien: and, that there is no particular lien upon this policy, is conceded; for, it is admitted that the premiums due in respect of it have been paid. Upon both points, therefore, the plaintiffs are entitled to succeed.

MAULE, J.—I also am of opinion that the plaintiffs are entitled to the judgment of the court. The policy in question, no doubt, is the property of the plaintiffs: and they are entitled to recover it in this action of detainue, unless the defendants can set up a lien. This they attempt to do,—not claiming a particular lien for money paid on account of this policy; for, the case finds that the premium has been paid, and that nothing is due in respect of it: but they set up a general lien. The case, it is said, finds that Wilson & Vause were factors, as well as other things, and, as such factors, they had authority to effect insurances for their principals; and that the particular transaction in question either was a transaction in which Wilson & Vause were employed as factors of Boyd & Co., or else it was a transaction in which, though not employed as factors, yet, as they *were* factors, they had a lien. I find nothing in the case to show that this policy was effected by Wilson & Vause in the course of their business as factors. A factor is a person who is employed to sell goods on commission. There was no employment to sell, at all connected with the employment under which this policy was effected. It appears by the case, that the policy was effected in October, 1845; that it was a policy on *ship*, not on *guano*, or any *419] thing which the factors were *employed to sell. Upon the policy being effected, it appears that Wilson & Vause paid the premium to Douglas & Co., through whose instrumentality the insurance was done, and that Wilson & Vause applied with some importunity to Boyd & Co. to recoup them the amount. This tends very much to show that

the transaction was something apart from the ordinary dealings between the parties,—a special order to effect this particular policy. It might be that that was consistent with the insurance being effected by Wilson & Vause in the character of factors: as, for instance, if the policy had been upon goods which were consigned to them for sale, as factors. In that case, the policy might be,—I do not say it would be,—subject to the general lien of the factors, as the goods themselves would be. But, here, the subject-matter of the insurance not being goods, the only way in which a general lien as factors could be said to attach to them, would be, that this was one of a number of transactions, in some of which Wilson & Vause acted as brokers, and it is to be inferred that this one is to be, as it were, infected by the society of those with which it is brought into contact. This is not very lucid; but probably it is the only way in which it could be put. I think, however, the correspondence which is set out in the case, prevents us from so dealing with the transaction, which is clearly treated by the parties as one single and separate transaction. This being the state of things, I think it is impossible that we can import into the case anything other than what appears on the face of the correspondence. We cannot assume that there was any pledge of this policy to satisfy any general lien. It was not insisted, nor could it be, that one who effects a policy, not as factor, but as insurance-broker, is entitled to a general lien on a policy in his hands, for a balance due *to him in the former character. Upon the whole, I think the plaintiffs are entitled to recover. [*420]

WILLIAMS, J.—I am of the same opinion. In point of fact, the statements in the case lead my mind irresistibly to the conclusion that Wilson & Vause did not effect the policy in question as the factors of Boyd & Co. In point of law, then, it is clear that their general lien as factors does not attach upon this instrument. And the statement shows that there exists no other lien upon which the defendants can rely.

TALFOURD, J., concurred.

Judgment for the plaintiffs.

Factors have liens upon the goods of their principals for charges incident to them, for a general balance due them as factors, and also for outstanding debts, for which they are only security. *Jordan v. Jarnes*, 5 Hammond, 88. So factors have a lien on the goods of their principals in their possession for their general balance, as well as for their particular advance. *Baker v. Fuller*, 21 Pick. 318. But not in respect of debts which arose prior to the time at which his character of factor commenced; nor in respect of torts. *Sturgis v. Slocum*, 18 Pick. 36. A factor or purchasing agent, in actual possession of two parcels of goods obtained under distinct orders, for both of which he is in advance although paid for one of the parcels, has a lien on the whole of the property. *Brooks*

v. Bryce, 21 Wend. 14; *S. C.* 26 Wend. 367. A factor's lien for a general balance accrued in the lifetime of his principal, does not attach to property coming into the factor's possession after the principal's death by order of his representative. *Wyllie v. King*, Geo. Decision, Part 2, 7. Possession of the property is necessary to create a factor's lien thereon; but the possession may be either actual or constructive. *Kollock v. Jackson*, 5 Georgia, 153. A. ordered goods to be packed and forwarded to F. & Co., commission merchants, to whom he owed a balance on account, and wrote a letter of advice, enclosing an invoice, but died before the letter was mailed or the goods had left his premises, and his son, on the day after his death, forwarded the letter and the goods, and F. &

Co. sold them and gave credit for the proceeds, account against A., and that they must pay in reduction of their balance against A., whose over the said proceeds to A.'s administrator. estate was insolvent: Held, that F. & Co. had Farnum v. Boutelle, 13 Metcalf, 159. no lien on these goods for the balance of their

DUNN v. WEST. Nov. 8.

A cause and all matters in difference between A. and B. were referred to an arbitrator, who was to have power to direct the verdict to be entered for A. or for B.,—the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, by his award, directed a verdict to be entered for B., and awarded that 303*l.* 15*s.* was due from B. to A. in respect of the matters in difference, and which sum he ordered to be paid by B. to A. on a given day:—Held, that B. was entitled to deduct from the sum so awarded to be paid by him, the amount of his taxed costs of the cause,—without regard to the lien of A.'s attorney for his costs of the cause and of the reference.

THIS action, and all matters in difference between the plaintiff and the defendant, were referred by order of *nisi prius*, which gave the arbitrator power to direct a verdict to be entered for the plaintiff or for the defendant, and provided that the costs of the suit, to be taxed, should abide the event of the award, and that the costs of the reference and avowal, to be taxed, should be in the discretion of the arbitrator.

*421] *The arbitrator, by his award, directed a verdict to be entered for the defendant in the action, and then proceeded as follows:—

“And I do further award and adjudge that there is now due and owing from the said James West to the said Thomas Dunn, for and in respect of all claims and demands, debts and damages, which he, the said Thomas Dunn, now has, or is entitled to receive or recover, against, of, or from the said James West, upon, for, or in respect of the matters in difference between the said Thomas Dunn and the said James West, the sum of 303*l.* 15*s.*, after allowing to the said James West for all claims and demands, debts and damages, which he, the said James West, now has, or is entitled to receive or recover against, of, or from the said Thomas Dunn, for or in respect of the matters in difference, and which said sum of 303*l.* 15*s.* I do hereby award, order, and direct shall be paid by the said James West to the said Thomas Dunn, on the 11th of March next, between the hours of twelve and three, at the office of Messrs. Robinson & Haynes, the attorneys of the said Thomas Dunn, and that, at the same time and place, the said Thomas Dunn shall pay to the said James West the costs which by the terms of the order of reference are to abide the event of my award, such costs in the mean time to be taxed by the proper officer: And I do further award and direct that the said Thomas Dunn and James West shall each respectively bear and sustain the costs incurred by him in and about this reference; and that the said said Thomas Dunn do pay the costs of this my award.”

The plaintiff's costs of the action were taxed at 145*l.* 1*s.* 5*d.*; the defendant's, at 180*l.*

The plaintiff's costs of the reference were taxed at 240*l.* 16*s.* 7*d.*

Pending the reference, Messrs. Robinson & Haynes, *the plaintiff's attorneys, gave notice to the defendant, by letter of the 30th of January, 1850, that the plaintiff had assigned to them absolutely the debt due to him from West, together with all benefit to be derived under the award, when made. [*422]

On the 2d of April, 1850, the defendant's attorney paid to the plaintiff's attorneys 123*l.* 15*s.*, being the balance of the sum of 303*l.* 15*s.* ordered by the award to be paid by the defendant to the plaintiff, after deducting therefrom 180*l.*, the defendant's taxed costs of the action. The plaintiff's attorneys, however, declined to receive the 123*l.* 15*s.* otherwise than as a payment on account,—they claiming to have a lien upon the whole sum awarded to be paid by the defendant to the plaintiff, for their costs of the action and of the reference, which together amounted to 385*l.* 18*s.*

After the making of the award, the plaintiff became bankrupt: and Robinson & Haynes were the solicitors for the assignees under the *fiat*.

Lush, in Trinity term last, on behalf of Messrs. Robinson & Haynes, obtained a rule calling upon the plaintiff and his assignees, and also upon the defendant to show cause why the defendant should not pay to them (Robinson & Haynes) 180*l.*, the balance of the 303*l.* 15*s.* so as above awarded to the plaintiff. He relied on *Cowell v. Betteley*, 10 Bingh. 432 (E. C. L. R. vol. 25), 4 M. & Scott, 265 (E. C. L. R. vol. 30), 2 Dowl. P. C. 780, where, upon a reference of two causes, damages in respect of the first being ordered by the award to be set off against costs in the second,—it was held, that this could only be done subject to the lien of the attorney of the plaintiff in the first case, for his costs.

Bramwell, on behalf of West, now showed cause.—This is an application of a most unusual description. *A man cannot, by virtue of a lien, have a greater claim than his principal has. Here, [*423] Messrs. Robinson & Haynes are, in effect, seeking to enforce against the defendant, a claim which the plaintiff himself could not have enforced. No doubt, the court will protect the lien of the attorney from being defeated by any fraud or collusion between the parties to the suit: it is so laid down in *Read v. Dupper*, 6 T. R. 361, *Ormerod v. Tate*, 1 East, 464, *Barker v. St. Quintin*, 12 M. & W. 441, 451, † *Gould v. Davis*, 1 Tyrwh. 380, *Swaine v. Senate*, 2 B. & P. 99, and many other cases. [JERVIS, C. J.—In all these cases the money was paid: here you say it was not payable to anybody.] Precisely so. *Cowell v. Betteley* has no bearing whatever upon this case; nor is it very intelligible: there, the arbitrator's discretion was limited to two causes which were referred to him; here, he had a general discretion over the cause and all matters in difference. The arbitrator there had exceeded the jurisdiction given to him by the order of reference: here, he has not. [MAULE, J.—The report in 4 Moore & Scott shows the ground upon which the court pro-

ceeded, viz. that, although the parties might have bound themselves, so as to give the arbitrator power, as between them, to set off the costs, they could not by their agreement defeat the lien of the attorney.] That explains the case. If an action were brought upon this award, in the name of the plaintiff, or an attachment moved for, the defendant would have a clear answer. In *Stephens v. Weston*, 3 B. & C. 535 (E. C. L. R. vol. 10), 5 D. & R. 399 (E. C. L. R. vol. 16),^(a) it was held, that, where an application is made to set off costs and damages in one action against those recovered in a cross-action, an attorney has a lien on the judgment obtained by his client against the opposite party, to the *424] extent of his costs, of that cause only. The letter of the 30th of January, 1850, shows that Messrs. Robinson & Haynes are relying rather upon an assignment of the debt to them, than upon any lien.

Channell, Serjt., and *Lush*, in support of the rule.—This case comes distinctly within the rule laid down in *Cowell v. Betteley*. TINDAL, C. J., there says (4 M. & Scott, 267 (E. C. L. R. vol. 30)): "It appears to me to be unnecessary on the present occasion to decide whether or not the arbitrator had power to award a set-off in the manner he has done, as between the parties. If, however, he had not done so, the court would. But the question is, whether the *jus tertii*,—the right of the plaintiff's attorney,—is to be governed by this act of the arbitrator, notwithstanding the rule of Hilary term, 2 W. 4, s. 93, or whether this case be out of the operation of that rule: in other words, whether the court will uphold the award, and so defeat their own rule. It appears to me that the rule in question must govern this case. It is clear, that, if there had been no reference to arbitration, the parties could not, by agreement between themselves, deprive the attorney of his lien for costs. Can they, then, by submitting the matters in difference to an arbitrator, effect this object? I think not. The words of the rule are very general,—'No set-off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought;' not even with the parties' consent: and, what higher authority can an arbitrator have, than that which the consent of the parties gives him? I therefore think that this rule applies as well to a case where the cause has been referred, as to where it has been in the ordinary course *425] pursued to its legal result." The rule was similarly laid down by PATERSON, J., in *Domett v. Helyer*, 2 Dowl. P. C. 540. "I cannot," says that learned judge, "allow one judgment to be set off against another, except on the condition of satisfying the attorney's lien. The 93d section of 1 Reg. Gen. Hilary term, 2 W. 4, expressly orders that, 'no set-off of damages or costs between parties shall be

(a) And see 3 Com. B. 830, n. (E. C. L. R. vol. 54).

allowed, to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought.' Unless the attorney's lien, therefore, is satisfied, the set-off cannot be allowed." *Caddell v. Smart*, 4 Dowl. P. C. 760, is precisely in point. There, the costs of a suit were allowed to be set off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney, —the cause and all matters in difference having been referred, and the arbitrator having ordered a verdict to be entered for the defendant, but found that the defendant was indebted to the plaintiff on other accounts. In *Doe d. Swinton v. Sinclair*, 5 Dowl. P. C. 26, on a reference to arbitration of an action of ejectment and all matters in difference between the parties, the arbitrator directed that a sum of 50*l.* should be paid by the lessor of the plaintiff to the defendants, by way of compensation for certain buildings erected by them, and that a verdict should be entered for the plaintiff. Upon motion, the court directed that the sum awarded to the defendants should be set off against the costs of the lessor of the plaintiff, *saving the lien of their attorney*. [JERVIS, C. J.—I feel considerable difficulty as to the form of this rule: it is, in effect, an attempt to obtain a rule of court, which will have the force of a judgment, under the 1 & 2 Vict. c. 110, s. 18, and so *completely to alter the rights of the parties. *Bramwell* referred to *Holcroft v. Manby*, 7 M. & G. 843 (E. C. L. R. vol. 49), 8 Scott, N. R. 473. There, a cause and all matters in difference between A. and B. were referred, C. consenting to be made a party to the reference: the arbitrator directed a verdict to be entered for B., but directed that C. should pay to A. 52*l.* 10*s.* and the costs of the reference and award: A. having become bankrupt, C. declined to pay without authority from A.'s assignees: and it was held that A.'s attorney, who had a lien upon the award for his costs, was not entitled to an order upon C. under the 1 & 2 Vict. c. 110, s. 18.] The decision in that case turned mainly upon the doubtful nature of the attorney's claim. [JERVIS, C. J.—Without regard to the statute, what right has the attorney to come and ask that the money may be paid otherwise than as ordered by the arbitrator, to whose judgment the parties have agreed to submit the matter?] This is the only way the attorney can enforce his lien. If the award were sought to be enforced by action, the defendant could by plea of set-off altogether defeat the lien; for, the rule of court would not avail against the statute of set-off. *Cowell v. Betteley* shows that the court will do what the nature and justice of the case require. As to the assignment of the debt, the court clearly could not give effect to that. The attorney does not set it up as giving him any right which he had not before.

JERVIS, C. J.—I am of opinion that this rule must be discharged. The cause and all matters in difference between the parties were referred to arbitration, the costs of the cause to abide the event of the award,
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and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator decides the *action in favour of *427] the defendant, West, and directs that the verdict be entered for him: and, as to the matters in difference, he awards 303*l.* 15*s.* to be paid by West to Dunn on a certain day and at a certain place; and he directs, that, at the same time and place, Dunn shall pay to West the costs of the action, to be in the mean time taxed by the proper officer. There is no direction in the award that the one sum shall be *pro tanto* set off against the other; nor did the order of reference give the arbitrator power so to direct. The costs of the action having been taxed at 180*l.*, the balance (123*l.* 15*s.*) was paid by West to Dunn; and this application seeks to compel West to pay the residue of the 303*l.* 15*s.* so awarded in respect of the matters in difference. Now, it is to be observed that the application is made, not by Dunn, the party to whom the money was directed by the award to be paid, but by Dunn's attorneys, who claim a lien upon it for costs. The claim rests upon the 93d rule of Hilary term, 2 W. 4, which provides that "no set-off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought." The origin and foundation of that rule was this:—In the Court of King's Bench, in setting off costs or damages between the parties, the lien of the attorney was respected: see Tidd's Practice, 9th edit. pp. 339, 392. In this court, it seems to have been the uniform practice to disregard the attorney's lien: *Figes v. Adams*, 4 Taunt. 633: though Lord ELDON, in *Hall v. Ody*, 2 B. & P. 28, expressed his disapprobation of it. The Court of Exchequer was without any settled practice upon the subject; following sometimes the practice of the Court of the King's Bench, and sometimes that of this court. The object of *428] the rule was, to render *the practice of the three courts in this respect uniform. The present application, however, is not one of the kind contemplated by the rule: and the analogy sought to be drawn from the rule, is not at all applicable to a case like this. I think we have no authority to do what we are asked to do.

MAULE, J.—I also am of opinion that this rule must be discharged. If an action were brought in the name of the plaintiff upon this award, and a set-off were pleaded in respect of the costs in question, could the attorneys' lien be set up by way of replication? Clearly not: and, if so, I do not see how we can in this way enforce the attorneys' claim. No such order has ever been made. The case is distinguishable from *Cowell v. Betteley*, upon the grounds stated. If it be thought desirable to give the arbitrator power to deal with the attorneys' lien, the proper course would be, to make provision for it in the order of reference. This right of set-off is a peculiar one: it is only a qualification of a practice which the courts had of allowing equitably a set-off of damages and costs in cross-actions between the same parties. The courts,—some of

them,—would only lend their assistance to the parties in thus setting off one judgment against another, upon the terms of protecting the attorney's lien. In no other way could the court have anything to do with the lien of the attorney. It is only to cases of that sort,—of which this is not one,—that the rule of Hilary term, 2 W. 4, has any application.

WILLIAMS, J.—I also think this rule should be discharged. The object of the application, is, not to obtain a judgment under the statute 1 & 2 Vict. c. 110, but to enforce the award by attachment. In other words, we are called upon to attach the defendant for contempt *in not obeying an award; the alleged disobedience being, the [*429 not paying the money to one to whom the arbitrator has not awarded it. It is an application which the court ought not for a moment to listen to.

TALFOURD, J.—I am entirely of the same opinion. The court clearly has no power to do what is asked. The 98d rule of Hilary term, 2 W. 4, which it is sought to apply here, was made for the purpose of regulating the discretionary power of the court under circumstances widely different from those of the present case.

Rule discharged, with costs.

JONES v. IVES. Nov. 12.

A cause and all matters in difference between the parties were referred by an order of *nisi prius*, by which a verdict was taken for the plaintiff, subject to an award,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator by his award ordered that the verdict entered for the plaintiff should stand, and directed that the defendant should pay to the plaintiff the costs of the reference and award:—Held, that the plaintiff was not entitled to have an *allocatur* for the costs, or to sign judgment, until the expiration of the proper time for moving to set aside the award.

THE cause *and all matters in difference* between the parties were referred by an order of *nisi prius*, made in Easter term last,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator made his award on the 13th of June last, by which he ordered that the verdict entered for the plaintiff should stand, and that the defendant should pay to the plaintiff the costs of the reference and award: and he further found that there were no matters in difference between the parties other than the action.

The master having refused to grant his *allocatur* for *the plaintiff's costs, on the ground that the defendant had the whole of the present term in which to move to set aside the award, [*430

T. Jones now moved for a rule to show cause why the plaintiff should not be at liberty to sign judgment forthwith, and why the master should not make his *allocatur*. [JERVIS, C. J.—I think the master is right.

Where the reference is of the *cause* only, the unsuccessful party has only the first four days of the ensuing term to move to set aside the award: but, where the reference is also of matters in difference, he has the whole term to move in.] Assuming that the defendant has the whole term to move in, it by no means follows that the plaintiff may not sign judgment. In *Cromer v. Church*, 15 M. & W. 310,† a verdict was taken, by consent, for the plaintiff, at nisi prius, subject to the certificate of a barrister, to be given in the following Michaelmas term, with power to him to enlarge the time for making it: the arbitrator enlarged the time till the following Easter term; and in the month of March gave his certificate, directing that the verdict should stand for a smaller amount: and it was held that final judgment might be signed immediately on the entry of this verdict upon the *postea*, and that the plaintiff was not bound to wait until after the expiration of the first four days of Easter term. POLLOCK, C. B., there says: "The verdict is to be considered as having been given at nisi prius: what has since been done relates back to that time; and the certificate was a mere completion of the verdict really delivered at nisi prius." [MAULE, J.—That was the case of a *certificate*, which in this respect differs materially from an award.] In *Little v. Newton*, 1 M. & G. 976 (E. C. L. R. vol. 39), 2 *481] Scott, N. R. 159, it was held, *that, where, upon a reference of a cause and *all matters in difference*, by articles of agreement, an award is made, under which the costs of the cause and of the award are to be paid by the defendant, the plaintiff is entitled to have the costs taxed, without waiting for the period during which the defendant would be at liberty to move to set the award aside. [JERVIS, C. J.—The case of *Hobdell v. Miller*, 2 Scott, N. R. 163,(a) is more like this: there, the court intimated an opinion that what you now seek cannot be done; MAULE, J., asking,—“How can the plaintiff have costs taxed, before it is certain that he can sustain the award?”] That is answered by *Little v. Newton*. [MAULE, J.—The distinction between the two cases is pointed out by the solicitor-general in *Little v. Newton*.]

JERVIS, C. J.—The two cases of *Hobdell v. Miller* and *Little v. Newton* are perfectly reconcilable with each other, and both are correct. In the former, as was observed by the solicitor-general in moving for the rule in *Little v. Newton*, the reference was by order of nisi prius, with a nominal verdict entered for the plaintiff: whereas, in the latter, the reference was by agreement between the parties. That makes all the difference. There is consequently no ground for this application.

The rest of the court concurring,

Rule refused.

(a) See 1 M. & G. 978(b) (E. C. L. R. vol. 39)

***MUNDAY v. STUBBS. Nov. 16.**

[*482]

A messenger in bankruptcy, who, intending to act *bonâ fide*, under a warrant directing him to seize the goods of A., seizes goods belonging to B., is not within the protection of the 12 & 13 Vict. c. 106, s. 107, and therefore is liable in trespass at the suit of B., without a previous demand of the perusal and copy of the warrant under which he professed to be, and believed he was, acting.

THIS was an action of trespass, for breaking and entering two dwelling-houses of the plaintiff, expelling him therefrom, and seizing and carrying away his goods.

Plea, not guilty "by statute."

The cause was tried before WILDE, C. J., at the sittings for Middlesex after last Trinity term. The facts were as follows:—One Bartlett, being indebted to the plaintiff, on the 22d of October, 1849, made over to him all his goods on premises whereon Bartlett had carried on his business. Bartlett afterwards became bankrupt. The plaintiff continued the business on his own account, upon the same premises, down to the 19th of November, when the shop was closed. On the 27th of November, the defendant, a messenger of the court of bankruptcy, entered the premises, and seized the goods, which remained thereon, acting *bonâ fide* under a warrant of commissioner, which, after reciting that property of the bankrupt was reasonably suspected to be upon the premises in question, proceeded as follows,—“These are, therefore, to authorize and require you, with necessary and proper assistants, to enter, in the day time, into, &c., situate, &c., and there diligently to search for the said property; and, if any property of the said bankrupt shall be found by you on such search, that you seize the same, to be disposed and dealt with according to the provisions of the said act,”—12 & 13 Vict. c. 106.

On the part of the defendant, it was submitted, that inasmuch as it was not disputed that what was done *by him was done *bonâ fide* [*483 in obedience to the warrant of the commissioner, and there had been no demand of the perusal and copy of the warrant, the defendant was within the protection of the 107th section of the statute 12 & 13 Vict. c. 106, which enacts “that no action shall be brought against any messenger, or his assistants, or other person appointed by the court, for anything done in obedience to any warrant of the court, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such messenger, or his assistant, or other person, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if, after such demand, and compliance therewith, any action be brought against such messenger, or assistant, or person so appointed,

without making the petitioning-creditor defendant, if living, the jury, at the trial of such action, on the production and proof of such warrant, shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the court by which such warrant shall have been granted; and, if such action be brought against the petitioning-creditor and the messenger, or assistant, or person so appointed, the jury shall, on proof of such warrant, give their verdict for such messenger, or assistant, or person so appointed, notwithstanding any such defect of jurisdiction; and, if the verdict shall be given against the petitioning-creditor, the plaintiff shall recover his costs against him, to be taxed so as to include such costs as the plaintiff is liable to pay to the messenger, and his assistant, or person so appointed as aforesaid."

Under the direction of the lord chief justice, the jury found for the plaintiff, in respect of the seizure of the goods only,—the subsequent *484] sale of them having taken place under the direction of the official assignee, who was not made a defendant, and the plaintiff having no interest in the premises,—and they assessed the damages at 70l.

E. James, on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant.

Byles, Serjt., and *Miller*, now showed cause.—The question is, whether, where a messenger in bankruptcy, acting *bonâ fide*, and intending to carry into execution a warrant commanding him to seize the goods of A., by mistake seizes the goods of B., it is necessary, in order to entitle the latter to maintain trespass for such unauthorized seizure, to demand the perusal and copy of the warrant, under the 12 & 13 Vict. c. 106, s. 107. It is submitted that it is not. Where he acts in obedience to the warrant, although the person who issues it may have no jurisdiction, the statute affords protection to the messenger. The provision is analogous to the 6th section of the 24 G. 2, c. 44, which enacts "that no action shall be brought against any justice, constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand and seal of any justice of the peace, until demand hath been made of the perusal or copy of the warrant," &c.; and that "if any action shall afterwards be brought against such constable, without making the justice a defendant, the constable, upon producing the warrant at the trial, shall be entitled to the verdict, notwithstanding the defect of jurisdiction in such justice." In *Money v. Leach*, 1 W. Blac. 555, 563, 3 Burr. 1762, *485] 1768, which is a leading case upon that statute, Lord MANSFIELD says: "The act of 24 G. 2 was meant to make the justice liable instead of the officer. Where, therefore, the officer makes such a mistake as will not make the justice liable, the officer cannot be excused." So, here, the object of the 12 & 13 Vict. c. 106, s. 107, is, to

make the petitioning-creditor liable, instead of the messenger. That case has repeatedly been acted upon. In *Prestidge v. Woodman*, 1 B. & C. 12 (E. C. L. R. vol. 8), 2 D. & R. 43 (E. C. L. R. vol. 16), the court say: "A constable is not protected, unless he acts in obedience to a warrant: but a magistrate is protected in all cases where he acts in execution of his office. The distinction between the magistrate and the officer in this respect, is settled in the case of *Money v. Leach*." So, in *Bell v. Oakley*, 2 M. & Selw. 259, where the defendants, in order to levy a poor-rate, under a warrant of distress granted by two magistrates, broke and entered the house, and broke the windows, &c.,—it was held, that they might be sued in trespass, without a previous demand of the perusal and copy of the warrant, according to the 24 G. 2, c. 44, s. 6. Lord ELLENBOROUGH there says: "The case of *Money v. Leach* decides that the defendant, in order to avail himself of the objection upon the statute, must show that he acted in obedience to the warrant." And DAMPIER, J., adds: "The case of *Money v. Leach* decided, that, where the justice cannot be liable, the officer is not within the protection of the statute." In *Smith v. Wiltshire*, 2 B. & B. 619 (E. C. L. R. vol. 6), 5 J. B. Moore 322 (E. C. L. R. vol. 16), where constables were directed, under a warrant, to search for and take *black* cloth supposed to have been stolen, and they took cloths of *a different description and colour*, and carried them before a magistrate, refusing, at the time they took them, to inform the owner whether they acted under a warrant or not: it was held that they were *within the protection of the 24 G. 2, c. 44, s. 8,(a) and, therefore, that an action against them [*486 ought to have been commenced within six calendar months from the time of such taking. So, in *Parton v. Williams*, 3 B. & Ald. 330, it was held, that, if a constable, under a warrant to take the goods of A., take the goods of B., believing them to belong to A., he is protected by the 8th section of the 24 G. 2, c. 44. But both those cases point out the distinction between the 6th and the 8th sections; and they expressly recognise the liability of the constable where he fails to act in obedience to the warrant, although he may have acted *bond fide*, and there may have been no demand of the perusal and copy of the warrant.

E. James, in support of the rule.—It is conceded that the messenger, in seizing the goods in question, acted *bond fide*, and with a reasonable belief that they were the goods of Bartlett. It is true that the warrant under which he professed to act, did not, in terms, authorize him to seize *reputed* property. But here, the messenger had every reason for supposing that the goods were the goods of the bankrupt: they once had been his property, and there was nothing to indicate that they had ceased to be so. [JERVIS, C. J.—You cannot put it higher than *bona fides*.] The object

(a) Which enacts that "no action shall be brought against any justice of the peace for any thing done in the execution of his office; or against any constable, headborough, or other officer, or person acting as aforesaid, unless commenced within six calendar months after the act committed."

of the act clearly was, to protect the messenger in the *bonâ fide* discharge of his duty. [JERVIS, C. J.—Would the petitioning-creditor be liable for the act of the messenger in taking the goods of A. under a warrant *437] *commanding him to take the goods of B. ?] Probably not. [JERVIS, C. J.—Do you contend, that, under no possible circumstances, could the messenger be liable, provided he acts *bonâ fide* ?] He is protected, if he acts with reasonable diligence, and under a reasonable belief that he is acting in obedience to the warrant. [MAULE, J.—Is that more than *bona fides* ?] *Bona fides*, according to the case of *Kine v. Evershed*, 10 Q. B. 143 (E. C. L. R. vol. 59), is not alone sufficient. There, in trespass for false imprisonment, it appeared that the plaintiff had been given in charge to a constable, by the defendant, without warrant, for doing malicious injury to a house. The defendant was attorney to the owner of the house, and alleged that he had acted under the statute 7 & 8 G. 4, c. 30, ss. 24, 28, and was entitled to notice of action under section 41. The judge asked the jury whether the defendant had acted *bonâ fide* ; and, on their answering in the affirmative, he nonsuited the plaintiff, for want of notice. The court held, that the jury should have been asked (with reference to s. 28, which enacts that persons found offending may be apprehended, without warrant, “by the owner of the property injured, or his servant, or any person authorized by him”), not only, generally, whether the defendant acted *bonâ fide*, but whether he had a reasonable belief that he was the owner’s servant, or had his authority. The party does not need the protection of the act, where all has been done correctly. The 108th section of the 12 & 13 Vict. c. 106, clearly substitutes the petitioning-creditor for the messenger: it enacts, “that, in any such action brought against the petitioning-creditor, either alone or jointly with any messenger, or assistant, or other person so appointed by the court, for anything done in obedience to the warrant *438] of the court, proof by the plaintiff *in such action, that the defendant or defendants, or any of them, is or are petitioning-creditor or creditors, shall be sufficient, for the purpose of making such defendant or defendants liable, in the same manner and to the same extent as if the act complained of in such action had been done or committed by such defendant or defendants.” [TALFOURD, J.—That is, the petitioning-creditor is substituted in all cases where the warrant has been obeyed.] Does that mean *strict* obedience? [JERVIS, C. J.—It means such obedience as will render the petitioning-creditor liable. MAULE, J.—Suppose the messenger *bonâ fide* takes A., believing him to be B., against whom the warrant is issued,—according to your argument, B. would be left without remedy; for, the messenger would be protected, inasmuch as he *bonâ fide* believed he was acting in obedience to the warrant; and the petitioning-creditor could not be sued.] It is submitted, that, in the case supposed, B. *might* sue the petitioning-creditor. The petitioning-creditor is the party who puts the whole machinery in motion: the mes-

senger is *bound* to act; he cannot exercise a discretion as to whether he will obey the warrant or not.

JERVIS, C. J.—I am of opinion that this rule must be discharged. If this question had arisen under the 159th section(a) of the statute, the defendant would *probably have been entitled to succeed; for, [*439 the provisions of that section were evidently intended to cover every case where the party *bonâ fide* believed he was acting in pursuance of the act. But this case must be decided upon the 107th section, the mere reading of which seems to me to dispose of it. No action is to be brought against any messenger or other person acting in obedience to a warrant of the court, unless a demand is made of the perusal and copy of the warrant, and not complied with. If an action is brought after demand made, and compliance therewith, without making the petitioning-creditor a party defendant, the jury shall find for the defendant; and, if the action is brought against the petitioning-creditor and the messenger, the jury, upon proof of the warrant, are to find for the messenger. These provisions of the statute can only be applicable in the case of an action brought for a thing done in obedience to the warrant,—where the messenger is protected, and the petitioning-creditor liable. If the messenger, intending to act in obedience to the warrant which directs him to seize the goods of A., seizes the goods of B., it is clear, upon all the authorities, that, although he acted *bonâ fide*, he would be liable. The cases decided on the 24 G. 2, c. 44, s. 6, are clear to that effect.

MAULE, J.—I am of the same opinion. The words of the 107th section of the statute are very plain. Taking them in their literal sense, they lead to the obvious conclusion that this is not a case to which the provisions in that section were intended to apply. If *they did, [*440 a complete bar would be given, to an extent which is not given by any analogous enactment. The construction which we are putting upon the clause, is more consonant to the probable intention of the legislature, and is one which is warranted by numerous authorities. When the messenger does no more than what the warrant orders him to do, he is not to be held responsible for the want of jurisdiction in the person who issues the warrant. The petitioning-creditor, having sued out the warrant, and placed it in the hands of the messenger, may properly be taken to have intended that it should be executed: and therefore it is but

(a) Which enacts "that every action brought against any person for anything done in pursuance of this act, shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and, if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and, if there be a verdict for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

reasonable that he should be held responsible, rather than the less literate person who acts ministerially on his behalf, and in strict pursuance of the authority. This construction of the act does not lead to any inconvenience in the present case: but the construction contended for on the part of the defendant would; and it would be inconsistent with the authorities.

WILLIAMS, J.—Mr. *James* has not attempted to point out any material distinction between the language of this statute, and that of the 24 G. 2, c. 44. It is, therefore, enough to say that the point has long been settled by numerous authorities.

TALFOURD, J.—I am of the same opinion. *Parton v. Williams* points out the precise distinction between the two sections of the 24 G. 2, c. 44, and discriminates between the absolute protection given by the 8th section, and the minor degree of protection afforded by the 6th section.

Rule discharged.

*441] *CRESWICK, Public Officer of THE SHEFFIELD AND ROTHERHAM JOINT-STOCK BANKING COMPANY, v. HARRISON. Nov. 22.

A cause and all matters in difference were referred to an arbitrator, who awarded as follows:—
 “Having heard and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before me in pursuance of the said reference, I do make and publish this my award in writing of and concerning the several premises so referred as aforesaid:” he then disposed of the several issues, and directed that the defendant should pay a certain sum to the plaintiff, and that upon payment of that sum, the plaintiff should execute and deliver to the defendant a general release:—Held, that the award was sufficiently final, and disposed of all the matters in difference referred.

The Court, however, refused to make an order on the defendant to pay the sum awarded, pursuant to the 1 & 2 Vict. c. 110, s. 18,—the case not being one in which they would have granted an attachment.

THIS was an action of assumpsit by the public officer of the Sheffield and Rotherham Joint-Stock Banking Company, against the manager of one of its branch establishments.

The defendant pleaded, amongst other pleas, the statute of limitations, and payment of 2700*l.* in accord and satisfaction.

The cause and all matters in difference between the parties were referred by an order of nisi prius. The arbitrator, by his award, after reciting that the cause and all matters in difference between the parties had been referred to him, “so as he should make and publish his award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as should require the same (or to the public officer for the time being of the said banking company, or to the personal representatives of the said John Harrison, in case of his death before the making of the said award), on or before the first of January then next ensuing,” proceeded as follows:—

“Having heard and duly and maturely weighed and *considered the several allegations, vouchers, and proofs brought before me [^{*442} in pursuance of the said reference, I do make and publish this my award in writing *of and concerning the said several premises so referred as aforesaid*, that is to say, I do award, order, and determine that the said plaintiff, as such public officer, had good cause of action against the said John Harrison, as stated in the several counts of the declaration in the said action; and that the said copartnership has sustained damages in respect of the causes of action therein mentioned, against the said John Harrison, amounting to the sum of 8189*l.* 8*s.*, and are entitled to recover the same therein: And, as to the issues joined between the said parties in the said action, I do determine, award, and adjudge the same in favour of the plaintiff, that is to say, I do determine, award, and adjudge, as to the issue joined on the first plea of the defendant,—that the defendant did promise in manner and form as the plaintiff in the said declaration hath thereof complained against the defendant; and as to the issue joined on the second plea of the defendant,—that the defendant did not pay to the said copartnership, nor did the said copartnership accept or receive, the said sum of money, in full satisfaction and discharge, in manner and form as the defendant in his said second plea hath alleged; and, as to the issue joined on the third plea of the defendant,—that the defendant did not deliver to the said copartnership, nor did the said copartnership accept or receive, the title-deeds, in full satisfaction and discharge, in manner and form as the defendant in his said third plea hath alleged; and as to the issue joined on the fourth plea of the defendant, that the said copartnership were not, nor are, indebted to the defendant, in manner and form as the defendant in his fourth plea hath alleged; and, as to the issue joined on the fifth plea of the defendant,—that the defendant was *intrusted with by the said copartnership, and received into his [^{*443} custody and control, the said moneys, securities for money, letters, ledgers, and banking-books, in manner and form as in the first count of the declaration is alleged; and, as to the issue joined on the sixth plea of the defendant,—that, to render such account as in the declaration in that behalf is mentioned, and to deliver such moneys, securities for money, letters, ledgers, and banking-books as in that behalf is mentioned, the defendant was requested by the said copartnership in manner and form as the plaintiff hath in that behalf alleged; and, as to the issue joined on the seventh plea of the defendant,—that the defendant did not duly render to the said copartnership a just and reasonable account of the said moneys and securities for money which were so committed and intrusted to him, and received by him, as aforesaid, and that he did not deliver to the said copartnership the said moneys and securities for money, letters, ledgers, and banking-books so intrusted and committed to him, and received by him, as aforesaid, pursuant to his said

promise in that behalf; and, as to the issue joined on the eighth plea of the defendant,—that the defendant did take bad, undue, and improper care of the said moneys, securities for money, letters, ledgers, and banking-books, and misapplied and appropriated the said moneys and securities for money in that behalf mentioned, and did lend and advance the said moneys to persons of bad and insolvent character and credit, without due or reasonable care in that behalf, in manner and form as the plaintiff had complained against the defendant: And I do award, order, and direct that the said John Harrison, his executors or administrators, do and shall pay to the said copartnership, at their banking-house at Bakewell, in the county of Derby, between the hours of one and three o'clock in the afternoon, on the 6th of November now next *444] ensuing, the said sum of 8139*l.* 8*s.* of lawful British money, and that the same shall be received and taken by the said copartnership in full satisfaction of their claims and demands so referred to me as aforesaid: And I do further award, order, and adjudge, that the title-deeds relating to property at Tideswell, in the said county, deposited with the said copartnership on the 3d of April, 1848, by the said John Harrison, shall be held by them as a security for the payment to them by the said John Harrison of the sum of 2700*l.*, and interest thereon, after the rate of 5*l.* per centum per annum, to be computed from the said 3d of April, 1848, parcel of the said sum of 8139*l.* 8*s.*, on the said 6th of November; and that the said copartnership shall, upon payment to them of the said sum of 2700*l.*, and interest thereon as aforesaid, by the said John Harrison, or his representative, on the said 6th of November, forthwith deliver unto the said John Harrison, or his representatives, the said title-deeds: And I further award, order, and direct, that the several documents enclosed with this my award, and respectively marked A., and signed by me, shall be delivered to the said John Harrison, and belong to him, and that it shall be lawful for him and his representatives to commence and prosecute any proceedings against the persons signing the same, in respect of the moneys therein mentioned, in the name of the said copartnership, or any public officer for the time being thereof, if he or they shall be so advised, upon giving to the said copartnership such security for the costs which they or the said public officer may become liable unto in or by reason of such proceedings, as any master or taxing-officer of the court in which any such proceedings may be commenced or prosecuted, shall think reasonable: And I further award, order, and adjudge, that any moneys which may be recovered in such proceedings, and also that any moneys which may at any time be received *445] by the said copartnership in respect of the moneys in the said documents mentioned, or any of them, after deducting any costs due to the said copartnership, or the said public officer, in respect thereof, shall belong and be paid to the said John Harrison: And I

further award, order, and determine, that the said John Harrison shall bear and pay his own costs of the said reference, and that he shall bear, and pay unto the said copartnership three equal fourth parts of the costs of the said plaintiff, of and attendant upon the said reference, and that the other fourth part of the said costs shall be borne and paid by the said copartnership; and that three equal fourth parts of the costs of this my award, shall be borne and paid by the said John Harrison, and the residue thereof by the said copartnership: And I do further award, order, and direct, that, on payment of the said sum of 8139*l.* 8*s.*, on the said 6th of November, by the said John Harrison to the said copartnership, and on payment of the said three equal fourth parts of the said costs, the said copartnership shall give to the said John Harrison a proper release of all cause and causes of action, claims, or demands, whatsoever, from the beginning of the world until the date of the aforesaid order."

Cowling, on a former day in this term, obtained a rule calling upon the defendant to show cause why he should not pay to the plaintiff the sum of 8139*l.* 8*s.* pursuant to the award,—with a view to the plaintiff's availing himself of the 1 & 2 Vict. c. 110, s. 18.

Byles, Serjt., also moved for a rule to show cause why the award should not be set aside, on the ground that the arbitrator had omitted to adjudicate upon all the matters referred to him, and that the award was not final. The affidavit upon which the motion was founded, stated that the parties had, when before the *arbitrator, gone into extensive transactions not included in the action; and, amongst other [*446 things, it was alleged that the following memorandum of agreement, signed by the attorney for the bank, and by the defendant, was produced before the arbitrator:—

"Memorandum, 3d April, 1848. Mr. Harrison has deposited with me title-deeds relating to property at Tideswell, for securing payment to The Sheffield & Rotherham Bank of the sum of 2700*l.*

(Signed) "WILLIAM WAKE.

"JOHN HARRISON.

"The above 2700*l.* to be accepted in full of all demands."

The learned serjeant relied on the case of *Gyde v. Boucher*, 5 Dowl. P. C. 127, where it was held, that where a cause and all matters in difference are referred to an arbitrator, and by his award he merely directs a verdict to be entered in favour of the plaintiff for one entire sum, the award is not final, and is therefore bad. COLERIDGE, J., in giving judgment in that case,—after stating the order of reference,—says: "This being the order of reference, the arbitrator by his award, made of and concerning the matters referred, *finds and ascertains* that the plaintiff is entitled to *recover damages* to the amount of 21*l.* 16*s.* 3*d.*, and directs that a *verdict* shall be entered for the said sum of 21*l.* 16*s.* 3*d.*, instead of the said nominal damages. Comparing these words with those of

the order, I think they must be taken to be a finding only as to the sum claimed in the cause; and if so, there is no finding as to the matters in difference, which yet were investigated by the arbitrator; unless, by directing that the defendant should pay the costs of the reference and award, or by his silence, the arbitrator can be intended *447] to have found *that nothing* was due in respect of those matters. But this intendment is unreasonable and unfounded; and by the uncertainty in which the arbitrator has left this matter, he has subjected the defendant to real inconvenience. As to the cause,—if, indeed, the sum of 21*l.* 16*s.* 8*d.* be made up in part of any latter claim,—he is prejudiced in any motion which he might make for costs under the 43 G. 8, having been held to bail for a larger sum. As to the matters themselves, he has not that protection against a second action which it was one object of the reference to give him. On these grounds, I think this award must be set aside.” [WILLIAMS, J.—We must take it that the arbitrator disallowed the claim in respect of the matters in difference, if he has said nothing about it. It is settled law, that the silence of the arbitrator is a decision.] Suppose an action were now to be brought in respect of the matters in difference, how can the defendant say that the award has disposed of them? [TALFOURD, J., referred to *Day v. Bonnin*, 8 N. C. 219, 3 Scott, 597. There a cause and all matters in difference between the parties being referred to arbitration, the arbitrators “having heard the proofs and allegations of the parties touching the matters in difference between them,” awarded “concerning the same,” that the defendant should pay the plaintiff 11*l.* 5*s.* in full of all demands in the cause: and the award was held sufficiently final.] There, the award showed that the arbitrators had disposed of everything referred to them.

JERVIS, C. J.—The court think you may take a rule, in deference to the opinion of COLERIDGE, J., in *Gyde v. Boucher*. I think, however, you will find that that case requires other authorities to support it. The *448] decision in the particular case may be right, but the reasons are certainly wrong.

Cowling now showed cause against the rule to set aside the award.—The question is, whether it sufficiently appears on the face of this award, that the arbitrator has finally disposed of all matters in difference between the parties. After reciting the order of reference, he professes to make his award “of and concerning *the said several premises* so referred as aforesaid,”—the only *premises* before mentioned, being, the cause and the matters in difference. There is abundance of authority to show that an award in that form is conclusive: and the case of *Gyde v. Boucher*,—assuming it to be capable of being supported,—does not materially bear upon this case. [MAULE, J.—You say that this award would be a bar to any action brought in respect of a cause of action subsisting

at the time of the reference?] Exactly so. Many of the authorities are collected in the note to *Birks v. Trippet*, 1 Wms. Saund. 38 a, n. (6), where it is said: "The opinion of the court in *Birks v. Trippet* was recognised and acted upon in *Wharton v. King*, 2 B. & Ad. 528, as an authority to show, that, by an award of general releases, the arbitrator must be deemed to have taken into consideration matters in difference submitted and made known to him, although not mentioned specifically in his award. And it should seem, that, even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator, does not *per se* prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters *submitted to him, provided it does not appear that he has excluded any: *Gray v. Gwennap*, 1 B. & Ald. 106; *Hayllar v. Ellis*, [*449 6 Bing. 225 (E. C. L. R. vol. 19), 3 M. & P. 553; *Gillon, in re*, 3 B. & Ad. 493 (E. C. L. R. vol. 23); *Day v. Bonnin*, 3 N. C. 219, 3 Scott, 597; *Brown, in re*, 9 Ad. & E. 522 (E. C. L. R. vol. 36), 1 P. & D. 391; *Dunn v. Warlters*, 9 M. & W. 293;† *Wyatt v. Curnell*, 1 Dowl. N. S. 327; *Veale v. Warner*, 1 Wms. Saund. 327, n. (2). Where, however, an arbitrator to whom all matters in difference in an ejectment cause were referred awarded, "of and concerning the matters referred," that the plaintiff was entitled to the possession "of a certain part of the lands sought to be recovered," which he set out by boundaries, and concluded his award without any further adjudication, it was held bad, for want of any decision as to the residue: *Doe v. Horner*, 8 Ad. & E. 235 (E. C. L. R. vol. 35)." In *Gray v. Gwennap*, Lord TENTERDEN says: "I think that it sufficiently appears from the award, that the arbitrator has decided concerning all the matters referred to him, by ordering a verdict to be entered for the plaintiff in the action. That he *may* have done so, is perfectly clear; and, if he had used in the award the words *de premissis*, there would have been no doubt on the subject. The award recites that all matters in difference were referred; and the arbitrator then awards a general verdict for the plaintiff, damages 2224l.; the fair meaning of which, is, that he found that sum due after settling all accounts between the parties." [JERVIS, C. J.—Very great effect is given to the words "of and concerning the premises," in *Wynne v. Edwards*, 12 M. & W. 708.†] ALDERSON, B., in that case asks,—“Why should we go out of our way to put an unnatural construction on the words, in order to defeat *the award which we ought rather to struggle to uphold?” In *Craven v. Craven*, 7 Taunt. 644 (E. C. L. R. vol. [*450 2), GIBBS, C. J., says: “This is a reference of all matters in difference and the award therefore ought to go to all matters in difference; and the arbitrator so recites in his award; and then he says,—‘Having considered all the evidence and papers touching the matters in difference,

I award that the plaintiff has no cause of action.' This, therefore, purporting to be an award concerning the matters in difference, is equivalent to an award on the premises, which, according to my recollection, must be taken to be final, as to all matters referred." *Dunn v. Warlters*, 9 M. & W. 293,† is to the same effect. There a declaration on an agreement to supply timber and slates to the plaintiff for the building of a house, alleged as a breach the non-supply of *timber* only: the defendant pleaded,—first, non assumpsit,—secondly, that he did supply the timber,—thirdly, part payment: the cause and all matters in difference were referred; and the arbitrator, by his award, after reciting that he had heard the evidence produced "touching the matters in difference," stated that he made his award "of and concerning the premises," and then proceeded to find specially on each of the issues in the action: and it was held that the award was sufficient, although it appeared that there was a matter in difference submitted to the arbitrator, as to the non-supply of *slates*. Lord ABINGER there said: "If this matter had been *res integra*, I should certainly have been disposed to think that this award was void; but we are bound by the authorities which have been referred to, and cannot set it aside. But for those authorities, I should certainly have thought, that, as the award must be in writing, its silence as to any matter in difference brought before the arbitrator, *451] prevented it from being a sufficient exercise of the *authority vested in him by the submission. There would be much weight in the argument, that the words 'of and concerning the premises' showed that the matter in question had been disposed of, if that matter had been previously mentioned in specific terms: but that has not been done. The authorities, however, especially the case of *Grey v. Gwen- nap*, are too strong to be got over."

Byles and Miller, Serjts., contra.—The award is bad, for uncertainty, and want of finality. The plea of accord and satisfaction was sought to be proved by the memorandum of the 3d of April, 1848: but it does not appear that the arbitrator took that into his consideration at all. He should have distinctly negatived the defendant's claim; or he might have awarded *mutual* releases. *Gyde v. Boucher*, 5 Dowl. P. C. 127, is directly in point: it is not enough merely to award "of and concerning the matters referred." [MAULE, J.—*Dunn v. Warlters*, 9 M. & W. 293,† is inconsistent with *Gyde v. Boucher*. I like Lord ABINGER's decision in *Dunn v. Warlters* better than his refinement about "written silence."] Suppose the defendant were to bring an action against the bank, or to file a bill in equity against them, in respect of this cross-demand, would this award afford them any answer? Clearly not. [MAULE, J.—You say it would not be covered by *de premissis*?] It is submitted it would not: there is no case where those words have been held to have that effect, where there have been legal proceedings.(a)

(a) See *Wynne v. Edwards*, 12 M. & W. 708.†

As to the cross-rule,—this clearly is not a case in which the court would enforce the award by attachment, and therefore not a case for an order under the 1 & 2 Vict. c. 110, s. 18.

*JERVIS, C. J.—I am of opinion that the rule for setting aside the award in this case, ought to be discharged. I think the arbitrator has decided, and properly decided, all the matters in difference between the parties. The rule was only granted in deference to the opinion expressed by my brother COLERIDGE, in *Gyde v. Boucher*. With the single exception of that case, the whole current of authorities,—the principal of which are collected in the note to *Birks v. Trippet*, 1 Wms. Saund. 33 a,—is opposed to the objection. I do not understand Lord ABINGER's judgment in *Dunn v. Warlters* as an expression of opinion on his lordship's part that the construction we are putting upon this award, is not the correct one. His lordship admits that the decisions are all one way. Here, the cause and all matters in difference are referred. The arbitrator makes his award "of and concerning the said several premises so referred to him as aforesaid." Surely that is an award of and concerning all the matters in difference. *Gyde v. Boucher* was cited in *Dunn v. Warlters*, but not relied on.

With respect to the cross-rule, for an order under the 1 & 2 Vict. c. 110, s. 18, it appears to me that that rule ought not, under the circumstances, to be made absolute. I think we have a right, notwithstanding the cases upon the subject, to consider what was the intention of the legislature in passing that act. I think that statute was never intended to call into existence a new description of orders: but that it simply meant this,—that, wherever an order for the payment of money was made by the court or a judge according to the ordinary course and practice of the court, such order should now have the force and effect of a judgment.(a) I do not think this is a case in which an attachment should be granted: and therefore I think the rule obtained by Mr. *Cowling* should also be discharged.

*MAULE, J.—I entirely concur in the construction which the lord chief justice has put upon this award. It is the construction which has been put upon awards in similar terms in many cases. I think the opinion of Lord ABINGER in *Dunn v. Warlters* is very much exaggerated. He, in effect, says, that, but for the authorities, he should have considered the matter. I think, that, if his lordship *had* considered it, he would have come to the same conclusion that his learned predecessors had come to. In support of that conclusion, there is a uniform current of authorities: opposed to it, there is the opinion of my brother COLERIDGE alone, whose attention was not, I think, sufficiently called to the earlier cases. I feel no difficulty whatever as to the alternative which we ought to adopt.

As to the rule which asks for an order upon the defendant to pay the

(a) See note A. at the end of this volume.

money awarded, so as to bring the case within the operation of the 1 & 2 Vict. c. 110, s. 18, I certainly go along very much with the lord chief justice in the remark he has made, that it never was intended that the courts should make orders simply for the purpose of enabling parties to put that provision in force. What the legislature meant, I apprehend, was this,—that, leaving the practice of the court as to the making of orders precisely as it stood before, in addition to the ordinary remedy by attachment, the party in whose favour the order is made, might be enabled to enforce it in the same manner as he could enforce a judgment. But, I must own, the courts have held otherwise in very many cases. They have repeatedly made orders for the payment of money, which, but for that statute, they would never have thought of making. But there must be some limit: we will not, at any rate, make such an order in a case where we would not grant an attachment. The granting of an attachment is discretionary: and that discretion is properly exercised *where a party contumaciously refuses to do that which he *454] is called upon by the court to do. The present case is not one of that kind; for, although I think there is nothing in the point urged against the validity of the award, yet I cannot but think that the defendant has made the application *bonâ fide*, and therefore I should entertain very great doubt as to the propriety of granting an attachment against him; and for the same reason I should not feel disposed to grant an order like that which is asked for by this rule. I think the plaintiff ought to be left to his remedy by action upon the award.

WILLIAMS, J., and TALFOURD, J., were at the Court of Criminal Appeal. Both rules discharged, without costs.

AUSTIN and Another v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Horses were delivered to a railway company, to be carried by them from A. to B., for hire, subject to a note or ticket containing the following notice:—"This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriages, and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damages, *however caused*, to horses, cattle, or live stock of any description, travelling upon their railway, or in their vehicles:"—

Held, that, giving to the words of the contract their most limited meaning, they must apply to all risks, of whatever kind, and however arising, to be encountered in the course of the journey; and, therefore, that the company were not responsible for injury done to a horse from the firing of a wheel, in consequence of the neglect of the servants of the company to grease it.

THIS was an action upon the case against The Manchester, Sheffield, and Lincolnshire Railway Company, to recover damages for the loss of

a horse *which was killed whilst being conveyed on the defendants' railway from New Holland, in the county of Lincoln, to Shoreditch. [*455

The first count of the declaration stated, that the defendants, before and at the time of the committing of the grievances thereafter mentioned, were the owners and proprietors of certain railways, to wit, The Manchester, Sheffield, and Lincolnshire Railways, and were possessed of certain carriages and trucks used by them for the carriage and conveyance of passengers, and horses, cattle, goods, and chattels, on certain journeys in and upon and along the said railways and certain other railways, to wit, The East Lincolnshire Railway, and Eastern Counties Railway, from a certain place, to wit, New Holland, in the county of Lincoln, to a certain other place, to wit, the Shoreditch station of The Eastern Counties Railway, in the county of Middlesex, and to divers other places upon the several railways aforesaid, for hire and reward; and did, before and at the time of the committing of the said grievances, exercise and carry on the business of common carriers for hire; and were commonly employed to carry and convey passengers, horses, cattle, goods, and chattels, from New Holland aforesaid to the said Shoreditch station, and from and to divers other places in, upon, and along the said railways: That, during all the time aforesaid, according to the usual and known course of business there practised and observed by the defendants and persons employing them to carry passengers, horses, cattle, goods, and chattels by the said railway, it was incumbent upon, and the duty of, the defendants to cause due and proper care to be taken, and proper and reasonably sufficient provision to be made, from time to time, during any such journey as aforesaid, on which any passengers, horses, cattle, goods, or chattels were being conveyed by the defendants, in order to guard *and provide against the friction of and arising during the said journey from the wheels and axles of the said trucks [*456 and carriages wherein such passengers, horses, cattle, goods, and chattels were being carried and conveyed, and the parts of the said trucks and carriages near to and in contact and connected with the said wheels and axles, and in order to guard and provide against fire being produced by such friction, and to preserve such carriages and trucks as last aforesaid, and the wheels and axles thereof, and other such parts thereof as aforesaid, from being broken and injured by such friction and fire as aforesaid; and, during all the time aforesaid, according to the said course of business then practised and observed by the defendants and persons so employing them as aforesaid, the said persons so employing them had no power or control over the management of any of the said trucks or carriages during any such journey as aforesaid, nor were they permitted or allowed to do any such things as were proper or necessary to guard against such friction and fire as aforesaid, or to preserve the said carriages, trucks, wheels, axles, or other parts aforesaid, from being broken

and injured, and without certain reasonable and proper provisions being made against such friction and fire as aforesaid during such journeys as aforesaid, passengers, horses, cattle, goods, or chattels, cannot, and could not at the time aforesaid, be safely carried or conveyed in such trucks and carriages by or along the said railways: That the plaintiffs, theretofore, and whilst the defendants were such carriers as aforesaid, and whilst such course of business as aforesaid was observed and practised, to wit, on the 23d of February, 1849, delivered to the defendants, to wit, at New Holland aforesaid, that is to say, at the railway-station there, divers horses, mares, and geldings, to wit, thirty horses, &c., of the plaintiffs, of great value, to wit, of *the value of 600*l.*, to be carried and *457] conveyed by the defendants for the plaintiffs, to wit, in and upon divers, to wit, three of the said trucks and carriages, and in and upon and along the said railways, for hire and reward to the defendants in that behalf, to wit, for the charge thereafter mentioned, from New Holland aforesaid, to the Shoreditch station aforesaid, *according to the usual and known course of business so practised and observed as aforesaid, except so far as the same was altered or qualified by certain terms expressed as thereafter mentioned in a certain note or ticket then by the defendants prepared and produced to the plaintiffs*: That it was in and by the said note or ticket expressed, that the sum charged to the plaintiffs in respect of the premises, was the sum of 22*l.* 10*s.*, being 7*l.* 10*s.* for each of the said three trucks; and that the said ticket was issued subject to the plaintiffs' undertaking to bear all the risk of injury by conveyance, and other contingencies; and that the plaintiffs were required to see to the efficiency of the carriages before they allowed their horses or live stock to be placed therein; and that, the charge being for the use of the railway, carriages, and locomotive power only, the defendants would not be responsible for any alleged defects in their carriages or trucks, unless complaint was made at the time of booking, or before the same left the station, nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon the said railways, or in the defendants' vehicles: That the defendants then accepted and received from the plaintiffs the said horses, mares, and geldings, to wit, upon the day and year last aforesaid, to be so carried and conveyed as aforesaid, according to the usual and known course of business then practised and observed as aforesaid, except so far as the same was varied or qualified by such terms as aforesaid: And that, although they, the de- *458] fendants, did *then and there, to wit, at New Holland aforesaid, so as aforesaid accept and receive of and from the plaintiffs the said horses, mares, and geldings, for the purpose aforesaid, and did then and there place them in and upon divers, to wit, three of the said trucks and carriages of them, the defendants, for the purpose of being carried and conveyed as aforesaid,—the efficiency of which said trucks and carriages the plaintiffs then saw to, and were satisfied with, before the said

horses, mares, and geldings were placed therein ; and the said horses, mares, and geldings were then booked, and the said trucks and carriages; with the said horses, mares, and geldings therein, then left the said station, to wit, at New Holland aforesaid, upon such journey as aforesaid: Yet the defendants, not regarding their duty to the plaintiffs in that behalf, but contriving and fraudulently intending to deceive and injure the plaintiffs, did not nor would, during the said journey, cause due and proper or any care, or proper or reasonably sufficient provision, to be taken or made, in order to provide against the friction arising during the said journey, of and from the wheels and axles of the said trucks and carriages wherein the said horses, mares, and geldings were so placed as aforesaid, and were being carried on the said journey, and of and from the said parts of the said trucks and carriages near to and in contact and connected with the said wheels and axles, or in order to guard and provide against fire being produced by such friction, or to preserve the said trucks, carriages, wheels, axles, and other such parts as aforesaid, from being injured and broken by such fire and friction; but altogether *grossly and culpably neglected* and omitted so to do; by reason whereof, and of the *gross and culpable negligence* of the defendants in that behalf, and after the said carriages and trucks, with the said horses, mares, and geldings therein, had left the said station, and whilst the same were under the *direction and control of the defendants, to wit, on the day and year aforesaid, one of the axles of one of the said trucks and carriages, to wit, of a truck and carriage wherein divers, to wit, seven of the said horses, &c., were then being carried and conveyed on the said journey, and the wheel connected with the said axle, became greatly heated by such friction as aforesaid, and fire was thereby produced in, upon, and about the said wheel and axle, and the parts of the said truck and carriage near to and in contact and connexion with the said wheel and axle, and the said truck and carriage thereby then became and was, during the said journey, and after the same had left the station, and long after the booking of the said horses, mares, and geldings, dangerous and unfit for the further carriage and conveyance of the said horses, mares, and geldings upon the said journey,—of all which the defendants then had notice, and were then requested by the plaintiffs either to cause to be made proper and reasonably sufficient provision against the said friction, and the fire occasioned thereby, or else to carry and convey the said horses, mares, and geldings, for and on the remainder of the said journey, in some other carriage fit and proper in that behalf; which they, the defendants, then wholly neglected and refused to do: That, after such fire had been produced by such friction as aforesaid in, upon, and about the said wheel and axle, and the said parts near thereto, and in contact and connexion therewith, of the said truck and carriage wherein the said last-mentioned horses, mares, and geld-

ings then were being carried and conveyed upon the said journey, and after the said truck and carriage had thereby become, upon and during the said journey, dangerous and unfit for the further carriage and conveyance of the said horses, mares, and geldings, and whilst the same *460] continued and was so dangerous and unfit, and after the defendants *had notice thereof, and after the defendants had been so requested as aforesaid, to wit, on the day and year aforesaid, although they, the defendants, then could and might and ought to have caused to be made proper and reasonably sufficient provisions against such friction as aforesaid, and the fire occasioned thereby, or else have carried the said horses, mares, and geldings, for and on the remainder of the said journey, in some other carriage fit and proper in that behalf; and, although a suitable and convenient opportunity for removing the said horses, mares, and geldings, into a safe, fit, and proper truck and carriage in that behalf, then, and when and after the defendants were so requested as aforesaid, and before the said axle so broke as hereinafter mentioned, occurred and offered itself, as they the defendants well knew, —nevertheless, they, the defendants, so contriving and intending as aforesaid, and disregarding their duty to the plaintiffs, and the said request of the plaintiffs in that behalf, then *recklessly, culpably, and with gross negligence*, and total disregard to the safe and proper conveyance of the said horses, mares, and geldings, and against the will of the plaintiffs, and well knowing the said truck and carriage to be so dangerous and unfit as aforesaid, continued to carry and cause to be carried the said horses, mares, and geldings on the said journey along the said railway, in the said truck and carriage, so having become during the said journey, and then still being, so dangerous and unfit as aforesaid, without making proper, or reasonably sufficient, provisions against such friction as aforesaid, or the fire occasioned thereby, until the said axle became, to wit, on the day and year aforesaid, further heated by such friction as aforesaid, and until further fire was then produced upon and about the said wheel and axle, and the parts of the said truck and *461] carriage near to the same, and in connexion and contact *there- with, and until the said axle, by reason of such friction as aforesaid, and the heat and fire occasioned thereby, and by and through the *gross and culpable negligence*, and grossly improper conduct of the defendants in that behalf, then became and was so weakened, injured, and worn away, that the same, during the said journey, to wit, on the day and year aforesaid, broke and gave way, and 'snapped asunder, and thereby the said truck or carriage wherein the said last-mentioned horses, mares, and geldings were so being carried as aforesaid, was then violently thrown out of its proper position on the rails of the said railway along which the same was then passing, and the last-mentioned horses, mares, and geldings, then being thereon, were then thrown violently down, and greatly lamed, and otherwise injured, insomuch that one of

the said last-mentioned mares of the plaintiffs, of great value, to wit, of the value of 50*l.*, afterwards, to wit, on the day and year last aforesaid, by reason of such injury, and not otherwise, died, and the residue of the said last-mentioned horses, mares, and geldings, in consequence of such injuries, became and were greatly deteriorated and lessened in value, to wit, to the amount of 200*l.*, and the plaintiffs were forced to expend, and became liable to pay, divers large sums of money, amounting to a large sum, to wit, 50*l.*, in and about endeavouring to cure the said last-mentioned horses, mares, and geldings of the injuries so by them sustained as aforesaid; and the plaintiffs, by reason of the premises, had not only been deprived of the use of the said last-mentioned horses, mares, and geldings, for a long space of time, to wit, one month; but the plaintiffs had also lost and been deprived of divers great gains and profits, which they would otherwise have derived from the sale of the said horses, mares, and geldings, to wit, to the amount of 200*l.*; and the plaintiffs averred that the said damages *and injury to the [462 said horses, mares, and geldings, were entirely occasioned by the *gross negligence* and gross misconduct of the defendants in the manner aforesaid, and were not caused by any insufficiency or defects existing in the said truck or carriage before or at the time when the said last-mentioned horses, mares, and geldings were placed therein, or at the time of such booking as aforesaid, or before or when the same left the station as aforesaid; nor by any injury, or risk of injury, by conveyance of, or other contingencies, or in any manner whatever, other than by the *gross negligence* and gross misconduct of the defendants.

The declaration also contained a count in trover.

The defendants pleaded,—first, to the whole declaration, not guilty.

Secondly, to the first count, that the said alleged injury in the said first count mentioned, to the said horses, mares, and geldings in the said first count mentioned, was an injury occasioned by conveyance, and other contingencies, within the true intent and meaning and effect of the said note, and not by the negligence or misconduct of the defendants in that behalf,—concluding to the country.

Thirdly, to the first count, that the said damage and injury to the said horses, mares, and geldings, were occasioned and caused by the insufficiency of, and defects existing in, the said truck or carriage at the time when the said horses, mares, and geldings were placed thereon, and not otherwise,—concluding to the country. Issue thereon.

The cause was tried before JERVIS, C. J., at the sittings in London after Hilary term, 1852. The facts which appeared in evidence were as follows:—In the month of February, 1849, certain horses of the plaintiffs were delivered to the Manchester, Sheffield, and Lincolnshire Railway Company, for the purpose of *being conveyed by them [463 on their railway, from New Holland, in the county of Lincoln, to the Shoreditch station, in London. Shortly after the train had started,

it was discovered that one of the wheels of the truck in which the horses in question were, was becoming heated, for want of grease; and, when the train arrived at Boston, the company's servants were requested by the plaintiffs' servant to cause the carriage to be removed from the train, and another substituted for it, but they declined to do so, alleging that there was not time for it: but they applied water to the wheel and greased it. When the train arrived at Peterborough, the wheel being still on fire, the station-master desired the driver to stop at Whittlesea, and grease it again. The driver, however, did not stop as directed; and shortly afterwards the wheel broke down, the truck was broken to pieces, and one of the plaintiffs' horses killed, and others injured.

The note of the contract under which the defendants received the horses to be carried, was in the following form:—

"Manchester, Sheffield, and Lincolnshire Railway.

"Lincolnshire Division.

"Ticket for horses, cattle, sheep, pigs, dogs, and live stock of every description.

"No. _____

Date _____ 18—

"From _____ to _____

£. s. d.

"_____ horses _____ @ _____

"_____ cattle _____ @ _____

"This ticket is issued subject to the owners' undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live stock to be placed therein; the charge being *464] for the use of the railway, carriages, and *locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damage, *however caused*, to horses, cattle, or live stock, of any description, travelling upon their railway, or in their vehicles."

On the part of the defendants, it was insisted that this ticket being the contract upon which they received the horses, they were, by its express terms, exempted from all responsibility for damage, of whatever kind, and however arising, which horses or other live stock might encounter during the journey.

For the plaintiffs it was submitted that the facts proved exhibited such a degree of *gross* negligence on the part of the company's servants, as to remove from them the protection of their notice.

The lord chief justice strongly inclined to this opinion, and so told the jury,—intimating at the same time, that the question whether such negligence entitled the plaintiffs to a verdict, was upon the record.

The jury found that the servants of the company had not exercised due care; and they accordingly returned a verdict for the plaintiffs.

W. H. Watson, in the ensuing term, obtained a rule calling upon the plaintiffs to show cause why the judgment should not be arrested, or why there should not be a new trial on the ground of misdirection. He referred to *Hinton v. Dibber*, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36, and *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 20 Law Journ., N. S., Q. B. 440 : and *WILLIAMS, J.*, referred to *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 847 (E. C. L. R. vol. 66).

**Macauley, Rew, and West*, on a subsequent day, showed cause.—The contract, controlled as it is by the notice at the foot of the ticket, clearly imposes some duty upon the company : the contract was entered into subject to the performance of that duty. It was not denied that there had been the grossest negligence on the part of the company's servants : and it was obvious that no precaution on the plaintiffs' part could have averted the calamity ; they had no power or control over the wheels, and could not have access to them for the purpose of greasing them. The cases occurring prior to the carriers' act, 11 G. 4 & 1 W. 4, c. 68, throw some light upon this. In *Garnett v. Willan*, 5 B. & Ald. 53 (E. C. L. R. vol. 7), a parcel which, with its contents, exceeded 5*l.* in value, having been delivered to A. & B., common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance ; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but in which B. had no concern, and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid. It was held, that, notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor. *BAYLEY, J.*, there says : "A carrier is entitled to have a compensation, in proportion to the value of the article intrusted to his care, and the consequent risk which he runs. He, may, therefore, by a *special notice, limit his responsibility to a reasonable extent. The notice given in this case was, that the carrier would not be answerable for parcels containing certain specified articles, nor for any parcel above the value of 5*l.*, if lost or damaged, unless an insurance were paid. The question, then, is, what is the fair meaning of the words 'lost or damaged.' In their largest sense, they would comprehend any case where the goods were lost or damaged by the wilful act of the carrier, or of his servant, even if he threw away the parcel intrusted to his care ; for, in that case, it certainly might be said to be lost. It seems to me, however, that that is not the fair and reasonable construction of those words in this notice.

Such a construction would certainly be wholly inconsistent with several decided cases, to which I shall presently refer. (a) The true construction of the notice seems to me to be this, that the carrier is not to be protected by the words lost or damaged, if he divests himself wilfully of the charge of the parcel intrusted to his care; because he thereby divests himself of his character of carrier of the thing intrusted to his care. The words lost or damaged, ought to be qualified thus,—‘the carrier himself doing nothing, by his own voluntary act, or the act of his servants, to divest himself of the charge of carrying the goods to the ultimate place of destination.’” And HOLROYD, J., says: “I am of opinion, upon principle, as well as upon the authority of decided cases, that a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct, or that of his servants.” *Sleat v. Fagg*, 5 B. *467] & Ald. 342 (E. C. L. R. vol. 7), is *to the same effect. In *Beck v. Evans*, 16 East, 244, where it was sought to charge a common carrier for the loss by leakage of a cask of brandy, notwithstanding such a notice, Lord ELLENBOROUGH said: “I think the carrier does not stipulate for exemption from the consequences of his own misfeasance; and, if goods are confided to him, and it is proved that he has misconducted himself, in not performing a duty which by his servant he was bound to perform, that is such a misfeasance as, if the goods thereby become damaged, his notice will not protect him from. Now, here, it appears that the wagoner was informed more than once of the leakage; after which notice, it was a duty he owed to his employers to have the leak examined and stopped at one of the stages where he halted. That being so, the carrier became clearly liable.” That case goes the whole length of the principle for which the plaintiffs contend in this case. The notice is to be construed with this qualification,—provided the company, by their servants, do not by their gross negligence contribute to the damage complained of. That principle is adverted to by Lord DENMAN, in *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 353 (E. C. L. R. vol. 66): “It appears to us to be clear,” says his lordship, “that the terms contained in the ticket given to the plaintiff at the time the horses were received, formed part of the contract for the carriage of the horses, between the plaintiff and the defendants, and that the allegation in the declaration that the defendants received the horses *to be safely and securely carried by them*, which would throw the risks of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket; and the alleged duty of the defendants, safely and securely to carry and convey the horses, would not arise upon such *468] a contract. *It may be, that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of

(a) His lordship afterwards referred to *Smith v. Horne*, 2 J. B. Moore, 18 (E. C. L. R. vol. 16), *Bodenham v. Bennett*, 4 Price, 31, *Birkett v. Willan*, 2 B. & Ald. 356, and *Nicholson v. Willan*, 5 East, 507.

the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract as it appeared in evidence." In *Lyon v. Mells*, 5 East, 428, it was held, that a carrier by water contracting to carry goods for hire, *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage: and this where he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10l. per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight:" for, a loss happening by the personal default of the carrier himself (such as, the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c. [JERVIS, C. J.—Here, you say the obligation of the company is, to provide a carriage with regularly greased wheels.] The allegation of duty is, "that it was incumbent upon, and the duty of, the defendants, to cause due and proper care to be taken, and proper and reasonably sufficient provision to be made, from time to time, during any such journey, &c., in order to guard and provide against the friction of and arising, during the said journey, from the wheels and axles of the said trucks and carriages, &c., and the parts of the said trucks and carriages near to and in contact and connected with the said wheels and axles, and in order to guard and provide against fire being produced by such friction, and to *preserve such carriages and trucks as last aforesaid, and the wheels and axles thereof, and other such parts thereof as aforesaid, from being broken and injured by such friction and fire as aforesaid." [WILLIAMS, J.—Surely that is not a traversable averment.] It alleges a duty to do something which was essential to the safe conveyance of the horses. Is the wilful neglect of the company a contingency against which the plaintiffs agreed to insure them? [CRESWELL, J.—Negligence on the part of the company's servants, *may* be a "contingency attending the journey."] The cases relating to carriers' notices were nearly all brought before the Court of Exchequer in *Wyld v. Pickford*, 8 M. & W. 443:† and they are all commented on in the notes to *Coggs v. Bernard*, in 1 Smith's Leading Cases, 102 et seq., and also in Story on Bailments, §§ 551—557. The general result is this, that the notice does not limit the responsibility of the carrier, in the event of a loss arising from gross negligence: *Owen v. Burnett*, 4 Tyrwh. 133, 2 C. & M. 353.† [CRESWELL, J.—The customer takes upon himself the responsibility of seeing to the soundness of the carriage, at starting. Suppose a defect arises during the journey, and the company's servants have notice of it, and say—"Oh, never mind: we are not responsible."] This notice clearly would not cover such a case as that. If it was the

duty of the company to cause the wheels to be greased, a notice by them that they would not hold themselves responsible for the breach of that duty, would clearly be void,—upon the principle laid down in *Furnival v. Coombes*, 5 M. & G. 736 (E. C. L. R. vol. 57), 6 Scott, N. R. 522, upon the authority of Bro. Abr. *Conditions*, pl. 238,(a) Jenk. Cent. 96, pl. 86, *Mary Portington's case*, 10 Co. Rep. 35 a, and other cases.

*470] *W. H. Watson* and *Hawkins*, in support of the rule.—The simple question is, what is the meaning of the contract into which these parties have entered. That it is a *lawful* contract, there can be no question: the carriers' act, 7 W. 4 & 1 Vict. c. 68, s. 6, expressly reserves to carriers the right to make special contracts: and the cases of *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66), and *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 20 Law Journ. N. S., Q. B. 440, show that there is nothing illegal or improper in this particular contract. The declaration is a very peculiar one: it begins by alleging the ordinary duty of common carriers; it then sets out the special contract, and avers that the defendants thereby undertook all the liability of common carriers, except so far as that liability is limited by the notice. There clearly was no duty cast upon the defendants, such as that alleged. [JERVIS, C. J.—Does not a proper carriage, mean, a carriage with properly greased wheels?] The notice exempts the company from responsibility for any accident which arises from the negligence of their servants in the course of the journey. The notice contains two parts,—one relating to carriages; the other, to accidents arising from other contingencies. Nine-tenths of the accidents which happen on railways arise from some culpable neglect on the part of some servant of the company. [CRESSWELL, J.—Do you contend that you are protected by the first part of your notice?] Yes: but, at all events, by the last part, which is extremely large. *Garnett v. Willan*, 5 B. & Ald. 53 (E. C. L. R. vol. 7), and *Sleat v. Fagg*, 5 B. & Ald. 342 (E. C. L. R. vol. 7), were both cases of breach of contract, and do not properly touch the question raised here. In *Hinton v. Dibbin*, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36, it was held, upon the carriers' act, 7 W. 4 & *471] 1 Vict. c. 68, *that, if a parcel, containing any of the valuable goods enumerated in the 1st section of the act, be sent to a carrier for conveyance, without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge, according to s. 2, the carrier is not liable for their loss, though it should happen by the gross negligence of his servants. Can it be doubted that it was the intention of the company to relieve themselves from all responsibility for accidents arising to horses and live stock by *any* negligence on the part of their servants? They contract to carry the horses to London, and there deliver them, provided no accident

happens, by whatever means, during the transit. The *dictum* of Lord DENMAN, at the end of the judgment in *Shaw v. The York and North Midland Railway Company*, was wholly collateral to the matter in issue. The company are not bound to carry otherwise than upon such terms as they may think fit to contract for: *Johnson v. The Midland Railway Company*, 4 Exch. 367.† *Cur. adv. vult.*

CRESSWELL, J., now delivered the judgment of the court:—

This was an action by the owners of certain horses, against The Manchester, Sheffield, and Lincolnshire Railway Company, to recover damages for the loss of a horse which was killed while being carried in a cattle-truck on the railway of the defendants.

[After stating the pleadings, his lordship proceeded.]

At the trial, before the lord chief justice, at the sittings in London after last term, his lordship left to the jury the question whether due care had been exercised by the servants of the defendants; which was found in *the negative: and the jury thereupon returned a verdict for [472 the plaintiffs,—the lord chief justice saying that the question whether such negligence entitled the plaintiffs to a verdict, was on the record.

No evidence was given of a conversion; but the verdict was, by inadvertence, entered for the plaintiffs on the second count also; but the parties agreed that it must be altered, and entered for the defendants.

In this term, Mr. *Watson* obtained a rule to arrest the judgment; or for a new trial, on the ground of misdirection.

The questions so raised were afterwards fully and ably argued; and we have taken some days to consider the various authorities referred to, and are now of opinion that the rule for arresting the judgment must be made absolute.

The declaration appears to have been drawn with great care, in order to avoid the objection upon which the decisions in *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66), and this case, (a) proceeded, and to lead to the supposition that there was some duty cast upon the defendants beyond that which arose out of the special contract made between them and the plaintiffs. But, after all the allegations as to the usual and known course of business practised and observed by the defendants, the plaintiffs found themselves obliged to aver that their horses were delivered to the defendants, to be carried according to the usual and well known course of business so practised and observed, *except* so far as the same was altered or qualified by certain terms expressed in a certain note or ticket then by the defendants prepared and produced to the plaintiffs. This ticket contained the following notice:—*“This ticket is issued subject to the owner’s under- [473 taking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the

(a) 20 Law Journ., N. S., Q. B. 440.

carriage before he allows his horses or live stock to be placed therein ; the charge being for the use of the railway, carriages, and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station ; nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway, or in their vehicles."

Notices of various kinds have, from time to time, been published by common carriers, with a view to limit the responsibility cast upon them by the common law. At one period, there was a disposition in our courts to hold that common carriers could not by these notices shake off that responsibility : but Mr. Justice STORY, in his work on Bailments, § 549, observes,—“The right of making such qualified acceptances by common carriers, seems to have been asserted in early times. Lord COKE declared it in a note to Southcote's case, 4 Co. Rep. 84 ; and it was admitted in *Morse v. Slue*, 1 Ventr. 238. It is now fully recognised and settled, beyond any reasonable doubt, in England.” For this assertion, he cites a number of authorities ; and we think that he has drawn a correct conclusion from them.

The question to be considered, then, is, what was the true nature of the contract entered into between the parties in this case. The ticket, which contains the terms of the contract, was issued “subject to the owner's undertaking to bear all the risk of injury by conveyance, or *474] other contingencies.” If this had been the only passage applicable to the risks to be borne by the owners, it might have been contended, on their behalf, that it did not extend beyond injuries sustained by reason of a journey by railway simply, or by means of some accident ; and that it would not protect the carriers from the consequences of negligence on the part of themselves or their servants. But the ticket further states that “the company will not be responsible for any damages, *however caused*, to horses, cattle, or live stock of any description, travelling upon their railway, or in their vehicles.” The framer of the declaration appears to have felt that this latter part of the ticket or contract (for, such it was) protected the company from liability, if injury was sustained by the want of what is usually called due care ; and therefore, after alleging that the defendants did not take due and proper care to provide against friction of the wheels and axles, &c., charged them with grossly and culpably neglecting to do so,—by reason whereof, and of the gross and culpable negligence of the defendants, the wheel of the carriage in which the horses were, took fire, and the injury complained of was sustained. And, if the terms of the contract are not sufficient to exonerate the company from responsibility for damages resulting from such negligence as is imputed, the judgment cannot be arrested.

The term *gross negligence* is found in many of the reported cases on this subject ; and it is manifest that no uniform meaning has been ascribed

to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible, and have been somewhat loosely used with reference to carriers for hire: and in *Hinton v. Dibber*, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36,—a case depending on the carriers' act, 11 G. 4 & 1 W. 4, c. 68—*Lord DENMAN, in giving judgment, observed, with much truth: "It [*475 may well be doubted whether between gross negligence, and negligence merely, any intelligible distinction exists." In *Owen v. Burnett*, 2 C. & M. 353,† BAYLEY, B., says: "As for the cases of what is called gross negligence, which throws upon the carrier the responsibility from which but for that he would have been exempt, I believe, that, in the greater number of them, it will be found that the carrier was guilty of misfeasance." Such, certainly, were the cases of delivery to a wrong person, sending by a wrong coach, or carrying beyond the place to which the goods were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance, or renunciation of the character in which the defendants received the goods. The charge is, that they ought to have taken precautions to guard against the consequences of friction of wheels and axles; and that they did not do so; and were guilty of gross negligence, in not doing it. The terms gross negligence, and culpable negligence, cannot alter the nature of the thing omitted: nor can they exaggerate such omission into an act of misfeasance, or renunciation of the character in which the defendants received the horses to be carried.

The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages, *however* caused, to horses, &c. In the largest sense, those words might exonerate the company from responsibility even for damage done wilfully,—a sense in which it was not contended that *they were used in this contract. But, giving them the most limited mean- [*476 ing, they must apply to all risks, of whatever kind, and however arising, to be encountered in the course of the journey: one of which undoubtedly is, the risk of a wheel taking fire, owing to a neglect to grease it. Whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract; and that such exemption appearing on the face of the declaration, no cause of action is disclosed; and that judgment must be arrested.

Rule absolute accordingly.(a)

(a) This case is inserted out of its course on account of the importance of the subject.

Common carriers may, by special contract, safety of goods delivered to them to be carried. limit the extent of their responsibility for the *Bingham v. Rogers*, 6 Watts & Serg. 495. A

common carrier cannot restrict his liability as such by a mere notice. *Slocum v. Fairchild*, 7 Hill, 292; *Fish v. Chapman*, 2 Kelly, 349. But he may limit his liability by a special contract, though not for losses arising from negligence; and where there is a special acceptance, the onus of showing not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier. *Swindler v. Hilliard*, 2 Richardson, 286. The proprietor of a steamboat is liable for cotton carried by him which is destroyed by fire on board his boat, unless he can show a well known, recognised, and established usage, to exempt such carriers from such liability except in cases where a higher rate of freight is paid, or unless a general and well understood notice to that effect has been given by this particular carrier, so as to constitute part of the implied contract; and even in these cases the carrier should be held to strict proof of diligence and care. *Singleton v. Hilliard*, 1 Strobhart, 203; *Laing v. Colder*, 8 Barr, 479; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard S. C. Rep. 344. Per NELSON, J., "A question has been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of *Gould et al. v. Hill et al.*, 2 Hill, 623, and the conclusion arrived at that he could not. See also *Hollister v. Nowlen*, 19 Wendell, 240, and *Cole v. Goodwin*, *Ibid.* 272, 282.

"As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property—the safe custody and delivery of the goods—we are unable to perceive any well founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

"The owner, by entering into the contract, virtually agrees that in respect to the particular transaction the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

"But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which

may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of *Hollister v. Nowlen*, that, if any implication is to be indulged from the delivery of the goods under a general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

"The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded upon doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

"The special agreement in this case under which the goods were shipped, provided that they should be conveyed at the risk of Harneden; and that the respondents were not to be accountable to him or to his employers in any event for loss or damage.

"The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands.

"This is the utmost effect that was given to a general notice both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us; nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation.

"Although he was allowed to exempt himself from losses, arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods and in their delivery, and to provide proper vehicles and means of conveyance for their transportation." *Ibid.*

IN THE EXCHEQUER CHAMBER

IN

Michaelmas Vacation,

OF THE

FOURTEENTH YEAR OF THE REIGN OF VICTORIA. 1856.

WATTS v. SALTER. Nov. 29.

An allottee of shares in a railway company provisionally registered,—the prospectus of which stated that its capital was to consist of 700,000*l.*, in 35,000 shares of 20*l.* each,—paid a deposit of 2*l.* 2*s.* per share, and signed the subscription contract, which stated that a capital not exceeding 700,000*l.* should be raised, and gave the provisional directors authority to carry on the undertaking, and to apply to parliament for the necessary powers, and out of the moneys which should come to their hands by way of deposit or payment of calls or otherwise, to pay all costs, &c., and generally to apply such moneys towards the fulfilment of any engagements which they might enter into, and in or towards the soliciting, &c., a bill or bills in parliament, and in obtaining the necessary acts for furthering the scheme.

The total number of shares taken up by the allottees, and upon which the required deposit had been paid, was 18,969 only, representing a capital of 379,380*l.* This number not being sufficient to comply with the standing orders of parliament, the provisional directors, in order to make up the requisite amount, procured a number of persons (of whom the defendant was one) to execute the subscription-contract, purporting, contrary to the fact, to become subscribers for shares to the number of 5236, representing a capital of 104,600*l.*, and to have paid the deposit thereon. Of this fact, the plaintiff was ignorant.

The directors, after incurring considerable expense, failed to comply with the standing orders of parliament, and consequently no bill was brought in, and the scheme was ultimately abandoned.

At the trial, the lord chief justice told the jury, that, the plaintiff having subscribed for shares, and executed a subscription-contract, in an association which was represented to have a capital of 700,000*l.*, in 35,000 shares, upon which a deposit of 2*l.* 2*s.* each was to be paid, and 18,969 shares only having been *bond fide* taken up,—the project to which the plaintiff subscribed must be considered as determined, and consequently that the committee were not authorized to go to parliament at the plaintiff's expense; and that, under the circumstances, the execution of the subscription-contract by the plaintiff had no material effect upon the plaintiff's right to recover:—

Held, upon a bill of exceptions, that this direction was erroneous; for, that the subscription-contract,—which must be read by itself, and without reference to the previous parol contract arising upon the letters of application and allotment,—authorized the directors to raise a capital not exceeding 700,000*l.*, but did not require them absolutely to raise that sum before they could take any steps to carry the undertaking into effect; and that, by executing the deed, the plaintiff authorized the directors to do all that was consistent with its provisions, and, amongst other things, to apply the deposits in furtherance of the scheme.

THIS was an action of assumpsit for money had and received, money paid, lent, and advanced, and money found due upon an account stated.

*The defendant pleaded non assumpsit.

The cause was tried before WILDE, C. J., at the summer assizes [478
at Exeter in 1847. The facts were as follows:—

Previously to the 30th of May, 1845, certain persons projected the construction of a railway, principally designed to establish or complete a railway communication between Dartmouth and Exeter; and proposed to form a joint-stock company which should obtain from parliament certain necessary powers to construct the proposed railway. On the 30th of May, 1845, the promoters of the proposed company duly made the returns required by the statute,^(a) and duly obtained a certificate of provisional registration. Before the 16th of September, 1845, the defendant and certain other persons formed themselves into a provisional committee for the promotion of the above-mentioned scheme, and undertook and had the management of it; and the defendant concurred in authorizing all the acts hereinafter stated. Before the said 16th of September, 1845, the committee published a printed prospectus of the scheme, commencing thus:—

*“(Provisionally registered.)

*479] “Dartmouth, Torbay, and Exeter Railway, from Dartmouth, Brixham, Paignton, Torquay, Newton Abbott, Chudleigh, and the neighbourhood of Mortonhampstead, to Exeter,—forming, in continuation of the London and South Western, the London, Salisbury, and Yeovil, and the Yeovil, Dorchester, and Exeter railways, a direct line from the metropolis to Dartmouth, Brixham, and the above-mentioned districts.

“Capital 600,000*l.*, in 30,000 shares, of 20*l.* each.

“Deposit 2*l.* 2*s.* per share. Liability limited to amount of shares.

“Provisional Committee,—(then followed the names and addresses of the provisional committee, including that of the defendant.)

“With power to add to their number; from whom the directors will be chosen.”

Then followed the names of the engineer, parliamentary agent, solicitors, interim secretary, and bankers of the proposed company, and a description of the line of the railway, and of its supposed advantages; and the prospectus concluded as follows:—

“This railway will also effect that which must be considered a great national object, viz. the junction of the English and Bristol Channels. By the junction of these channels, an immense traffic must ensue between the termini, the respective ports of Dartmouth and Barnstable. The above railway will be about thirty-five miles in length: and the committee are satisfied, from the result of the preliminary survey, that the proposed capital will be amply sufficient. The committee will at once proceed to complete the surveys, and take all the necessary steps for obtaining an act in the ensuing session of parliament. Power will be given in the bill, to allow interest at the rate of 4 per cent. per annum
*480] on the calls, from the time of *payment until the opening of the line, and no liability will be incurred by any subscriber beyond

the amount of his subscription. The committee, in the allotment of shares, will give a preference to parties locally interested; and, in all cases, satisfactory references will be required, to a banker, or to some person of known respectability. The above line being an extension of the Dartmouth, Brixham, and South Devon Junction Railway, the applicants for shares in that project will, on a renewal of their applications, in the annexed form, have a priority in the allotment of shares in the railway now proposed. Applications for shares, in the form annexed, may be made to the secretary, and to the under-mentioned brokers, &c."

Then followed a form of application for shares,—

"I, A. B., applicant for shares in the Dartmouth, Brixham, and South Devon Junction Railway, request you will allot to me — shares of 20*l.* each, in the above company: and I hereby undertake to accept such shares as may be allotted to me, not exceeding the above number, and to pay the deposit thereon of 2*l.* 2*s.* per share, and execute the necessary deeds, when required. Dated, &c."

This prospectus came to the knowledge of the plaintiff before the 24th of September, 1845; and thereupon the plaintiff wrote and sent to the provisional committee an application, in the form above given, for fifty shares.

Between the 1st and the 8th of October, 1845, the provisional committee appointed two committees out of their own body, viz. a managing committee, of which the defendant was a member, and to which was then deputed by the provisional committee the general management and superintendence of the said scheme, and a committee of allotment, to which was committed the duty of allotting shares, under the general *directions of the managing committee. The defendant autho-
rized the acts of these two committees hereinafter stated. [*481

On the 8th of October, 1845, the managing committee, in pursuance of the powers deputed to them by the provisional committee, as aforesaid, varied the said scheme, by increasing the capital to 700,000*l.*, and the number of shares to 35,000, and duly registered such prospectus. The committee of allotment were directed by the managing committee to make their allotments upon such estimated capital of 700,000*l.*, in 35,000 shares, and were engaged on the 8th and 9th of October in making the allotments. They allotted twenty shares to the plaintiff in the said scheme so varied, and caused the following letter to be written to him:—

"Dartmouth, Torbay, and Exeter Railway.

"London, 9th October, 1845.

"Sir,—The committee of management having allotted to you twenty shares of 20*l.* each in this undertaking, I am instructed to request you will pay the deposit thereon of 2*l.* 2*s.* per share (amounting to 42*l.*) on or before the 16th of October instant, to one of the company's bankers;

in default of which, this allotment will be absolutely void, and the shares otherwise allotted. I am also to inform you that scrip for shares will be delivered to you in exchange for this letter and receipt, upon your executing, within the period limited for that purpose, the parliamentary deed and subscribers' agreement."

(Signed) "J. WHIDBORNE, Interim Sec."

The total number of shares allotted in the said scheme by the said allotment committee, was 33,600. This included 3000 shares, of which 1000 shares were allotted to the then solicitors, as for a compensation *482] for their trouble: but they were to have a proper remuneration for their ordinary professional services besides. At that time, the shares were at a premium of 5s. per share. Afterwards, one of the committee of management objected to this allotment to the solicitors, and thereupon the solicitors declined the allotment. No minute of the cancelling of such allotment or of such shares, was ever made; and no letters of allotment were made out in respect of such last-mentioned shares. On the said 9th of October, the said managing committee caused a similar letter to that sent to the plaintiff as above described, to be written and sent to each of the other allottees, except the said solicitors. Upon the 11th of October, the variation in the amount and number of shares and capital, was published by the managing committee, in the following printed prospectus, circulated in different newspapers on that and subsequent days:—

"Dartmouth, Torbay, and Exeter Railway.

"Registered provisionally.

"Capital 700,000*l.*, in 35,000 shares of 20*l.* each.

"Deposit, 2*l.* 2s.

"Committee of management—[then followed the names of the committee of management, twenty-one in all, including that of the defendant, and of the engineer, bankers, solicitors, and secretary; and the prospectus concluded as follows:—]

"The allotment of shares in this railway is completed, and the letters have this day been posted. The committee of management, from the great number of applications, compared with the number of shares to be allotted, have, with regret, been obliged to pass over the applications of many responsible parties, with most unexceptionable references, and to reduce the number applied for by those whose applications the committee have felt bound to entertain."

The plaintiff saw this prospectus forthwith after its publication, and *483] afterwards, viz. on the 20th of October, *1845, paid his deposit of 2*l.* 2s. per share on the twenty shares allotted to him, amounting to 42*l.*, to Messrs. Sanders & Co., bankers of the said managing committee, who then received it on their account and by their authority, and then filled up and signed the said bankers' receipt in the said letter to the plaintiff, and re-delivered the said letter containing the

said receipt so signed, to the plaintiff: and this action is brought to recover back the said sum of 42*l.* so paid.

Of the shares allotted, the total number of shares taken up by the allottees, and upon which the required deposit of 2*l.* 2*s.* was paid, was 18,969, representing a capital of 379,380*l.*: and this number of shares (18,969) was the whole number of shares stated in a certificate duly registered in July, 1846, to have been allotted, and on which it was therein stated that the deposits had been paid. The deposits so paid amounted to 41,731*l.* 16*s.*: and before the end of October, 1845, the panic in relation to railway speculations had arisen. The shares had become at a discount, and no person would then take up shares; and it was therefore deemed useless to make any new allotment of the shares which had not been taken up, and upon which the deposits had not been paid; and no new allotment was ever made: and this state of things continued up to the time when the thirty-five persons signed the deed, in the month of January, under the arrangement herein mentioned.

The allottees who paid the deposit upon the 18,969 shares, consisted of 449 persons, including the plaintiff; all of whom, after having paid their deposits, duly executed the subscription-contract; and no other persons executed the subscription-contract, except thirty-five persons, who executed the same after the 27th of January, 1846, under an arrangement with the managing committee herein mentioned.

*Before the date of the subscription-contract next herein mentioned, the name of the projected railway was, by the said managing committee, changed into "The Dartmouth, Brixham, Torbay, and Exeter Railway,"—the scheme in other respects continuing the same. [*484

Before the 20th of October, 1845, an indenture, called the subscription-contract, was presented to the plaintiff for his execution, as one of the necessary deeds referred to in the letters sent to the plaintiff by the committee, as before stated, and in the said letter of allotment to him, and which was drawn up by the authority of the managing committee,—of which the following is a copy:—

"This indenture, made the 20th day of October, 1845, between the several persons whose names are hereunto subscribed and seals affixed in the schedule hereto, of the first part, and J. H. Whiteway, of, &c., gentleman, J. S. Scarborough, of, &c., gentleman, and W. R. H. Jordan the younger, of, &c., gentleman (trustees named and appointed for the purpose of enforcing and giving effect to the covenants and agreements herein contained), of the second part,—Witnesseth, that each and every of them the said several persons parties hereto of the first part, doth hereby for himself or herself, his or her heirs, executors, and administrators, as concerning only the acts, deeds, and defaults of himself or herself, and his or her heirs, executors, and administrators respectively, and to the extent only of the amount or sum of money in the schedule hereto

set opposite to his or her respective name, and not further or otherwise, covenant and agree with the said J. H. Whiteway, J. L. Scarborough, and W. R. H. Jordan, and the survivors and survivor, of them and the executors and administrators of such survivor, in manner following, that is to say, that each of them, the said parties hereto of the first part, hath subscribed *485] and doth hereby subscribe the *sum of money sterling set opposite to his or her respective name in the said schedule hereto, as the sum subscribed by him or her for the purpose of making and maintaining a railway to be called 'The Dartmouth, Brixham, Torbay, and Exeter Railway,' or by such other name or names as may at any time or times hereafter be adopted by the provisional directors for the time being engaged in promoting the undertaking hereby contemplated; such railway to commence at or near Hoodoun, in the parishes of Brixham and Kingwear, in the county of Devon, or in one of such parishes, and near or opposite to the town of Dartmouth, in the parishes of St. Saviour, St. Petrox, and Tunstall, in the same county, and from thence to proceed and pass through or near the townships or hamlets of Brixham, Paington, Torquay, Newton-Abbott, Newton-Bushell, and Chudleigh, in the same county, and thence, following the course of the river Teign, or near such course, towards Lea Cross and Dunsford, and thence by certain spots or places called Perridge Pitts and Taphouse, or some or one of such places, or near thereto, to the city of Exeter, and to terminate at or near a place called Northernbay, in the parish of St. David's, in the county of the city of Exeter, or at some other place at or near the city of Exeter, together with such branches and extensions to, from, and out of the said line of railway, as may be necessary or convenient for forming suitable connexion and junctions with the following existing and projected railways, or any or either of them, that is to say, The Exeter, Yeovil, and Dorchester Railway, The Bristol and Exeter Railway, The South Devon Railway, The Cornwall and Devon Central Railway, The Taw-Vale Extension and Dock Railway, and The Crediton and Exeter Railway, or with any other railway or railways which shall approach the said city of Exeter,—together with a branch from or out of *486] the said *intended main line of railway, to commence at or near Lea Cross, Dunsford, or Taphouse aforesaid, and to terminate at or near the township of Crediton, in the said county of Devon; and also together with a branch from or out of the said intended main line of railway to commence at or near Galmpton, in the parish of Churston Ferrers, in the said county of Devon, and to terminate at or near the township of Brixham, in the said county of Devon, together with all convenient stations, wharfs, quays, staiths, landing-places, tunnels, bridges, viaducts, warehouses, offices, yards, and other erections, roads, communications, approaches, and other works and conveniences respectively appertaining thereto or connected therewith; with full power for the provisional directors aforesaid, from time to time to alter or vary, as

well the respective places or sites at which the said main railway and the said branches or connected railways respectively, any or either of them, or any extension or extensions thereof, shall commence, as also the respective sites or spots at which they respectively, any or either of them, shall terminate, and the intermediate courses, routes, or lines thereof respectively; and also with power for them to abandon, vary, or postpone the said branches or connected railways, or any or either of them, and adopt any other branch or branches or extensions which they may think fit; and also from time to time to determine and fix upon, and from time to time to alter and vary the extent and situation of the warehouses, stations, bridges, approaches, buildings, works, and conveniences belonging to or connected with the said main line and branches or connected railways, any or either of them; and to make application to parliament, in the next session, for all or any of the purposes aforesaid, as the said provisional directors shall think fit, or to confine the application or applications to parliament in the next session, to any or *either of the said railway and branches or connected lines, or to [*487 any portion or portions thereof, or of any or either of them; and also with full power and authority for the said provisional directors to enter into any arrangement or arrangements which they may think proper or expedient for the amalgamation or consolidation, wholly or partially, of the said intended railway company with any other railway company or companies now in existence, or projected, or for permitting any other railway company or companies now in existence or projected, to hold shares, or to have any other interest therein, or to enter into and make any other agreement, contract, or arrangement with any other railway company or companies now in existence, or projected, for enabling such companies, or any of them, to purchase or rent and work the said intended railway and branches thereof, or any of them, or any part or parts thereof, or for enabling the said intended railway company to use any portion of the line or lines or stations of any railway company or companies now in existence, or projected, or any or either of them, and to guaranty interest and other benefits to the proprietors therein, to such extent, on such terms, and subject to such stipulations, provisions, and conditions as the provisional directors may think fit: and also with full power and authority for the said provisional directors to enter into any arrangement, contract, or contracts which they may think proper or expedient, with the commissioners for improving the harbour and market of Brixham; and, in pursuance of and for carrying into effect any such agreement, contract, or arrangement, to be made or entered into with any company or companies now in existence, or projected, or with the said commissioners, or any or either of them, for any of the purposes aforesaid, to make application to parliament for, or to consent to, the introduction by parliament of, *any such clauses and provisions in any act of parliament for making the aforesaid railway [*488

communication and works for which application may be made as aforesaid, or in any other act of parliament which may be necessary or required for effecting any arrangement, contract, or agreement with the said commissioners for improving or completing the harbour of Brixham, and the pier there, as to the said provisional directors may seem proper and advisable; and also to apply for an act for the incorporation of the company formed for making and establishing the said proposed main railway, or branches thereof, or connected railways, or any or either of them, for purchasing and holding the aforesaid pier and harbour, and works connected therewith, or for any or either of such purposes: and also with full power and authority for the said provisional directors to enter into any arrangement, contract, or contracts which they may think proper or expedient, with the proprietors of the floating-bridge at Dartmouth, and with all persons interested therein or in any of the ferries across the river Dart, near Dartmouth, either for the purchase or lease of the said floating-bridge and ferries, or any of them: and also with full power and authority for the said provisional directors to apply to parliament for all necessary powers for the purchase or lease of the said floating-bridge and ferries, or any of them, or for the establishment and maintenance of such bridge and ferry across the said Dart, near Dartmouth, as may be necessary and convenient for the purposes of the said intended railway: And this indenture further witnesseth, that the said several persons parties hereto of the first part, do hereby recognise and acknowledge, and also nominate and appoint the following persons, that is to say [here followed the names of twenty-one persons, including that of the defendant], as the provisional directors, and the survivors and survivor of *489] *them, and such other person or persons as shall hereafter be added to their number in manner hereinafter mentioned, to be the provisional directors for managing and conducting the affairs of the undertaking hereby contemplated, until an act or acts of parliament shall be obtained, and for the purposes, and with the several powers herein specifically expressed: and the said parties hereto of the first part do also hereby nominate and appoint the said Hugh Charles Lord Clifford (one of the persons above named) to be the chairman, and the said Sir H. P. Seale and B. Fulford (others of the persons above named) to be the deputy-chairmen of the said provisional directors: And this indenture further witnesseth, that each of them the said several persons parties hereto of the first part doth hereby, for himself or herself, his or her heirs, executors, and administrators,—as concerning only the acts, deeds, and defaults of himself or herself, and his or her heirs, executors, and administrators, and to the extent only of the amount or sum of money in the schedule hereto set opposite to his or her respective name,—further covenant and agree with the said J. H. Whiteway, J. L. Scarbrough, and W. R. H. Jordan, and the survivors or survivor of them, and the executors or administrators of such survivor, in manner follow-

ing, that is to say, that they the said several persons parties hereto of the first part, and their several and respective heirs, executors, and administrators, shall and will well and faithfully observe, perform, and abide by the several rules and regulations hereinafter mentioned and set forth, until the act or acts of parliament herein referred to shall be obtained, that is to say,—

“First, that a capital not exceeding 700,000*l.* sterling in the first instance, shall be raised, in shares of 20*l.* each; but that the provisional directors hereinbefore named, or to be appointed as hereinafter *mentioned, shall have power from time to time to increase such capital, or other the capital for the time being of the said under- [*490 taking, if they shall deem it advisable so to do, and to raise such additional capital in like shares of 20*l.* each, and to appropriate and allot the same either amongst the original subscribers to the said undertaking, who shall agree to accept the same, by signing these presents, or to such other persons subscribing these presents, as the said provisional directors for the time being may think proper :

“Secondly, that a deposit of 2*l.* 2*s.* per share shall be paid by each subscriber on the number of shares subscribed for by him or her, at the time of, or previously to, signing this deed; and that the fund to be constituted by the payment of such deposits, shall be subject to the disposal and control of the said provisional directors, for the purposes of the said undertaking, and shall be applicable for providing the tenth part of the amount subscribed which is required to be deposited with the Court of Chancery, in compliance with the standing orders of the two houses of parliament, and also for carrying into effect all and every or any arrangement or arrangements, treaties, bargains, contracts, or agreements already entered into, or hereafter to be entered into, by the said provisional directors for the time being, under the powers of and pursuant to this agreement :

“Thirdly, that Messrs. Masterman & Co., of London, and Messrs. Watts & Co., of Teignmouth and Newton Abbott, in the county of Devon, shall be the bankers of the said company :

“Fourthly, that all sums which shall have been, or shall be, paid by way of deposit or subscription on any of the shares in the said undertaking, into any bank or banks, shall be paid into the bank of one of the said bankers of the said company, when and as the said provisional directors shall order, and shall be placed to *the joint [*491 credit of such provisional directors, to be held and applied by them upon the trust hereinafter mentioned, viz. upon trust from time to time to pay and apply so much and such parts thereof for the purpose of the said undertaking as any two members of the finance committee for the time being, or as any three or more of the provisional directors, by any order in writing, signed by them, and respectively countersigned by the secretary, shall direct; and every such order or writing, so

signed, shall be a full and sufficient acquittance and discharge to the said bankers respectively for the moneys which shall be paid in pursuance thereof, notwithstanding such order or writing may have been signed without such direction as next hereinafter is mentioned; and the aforesaid bankers, or any of them, shall not be in any wise obliged to see to the application thereof, or be in any wise answerable for the misapplication or non-misapplication thereof: provided always that no such order or writing shall be signed unless some meeting of a finance committee, or of a board of provisional directors, shall have previously directed the same to be signed.

“Fifthly, that so much of the moneys which shall be placed to the credit of the said provisional directors, or any of them, under the provisions herein contained, as shall, in the opinion of such provisional directors, not be immediately wanted for the purposes of the said undertaking, may, from time to time, if such provisional directors shall think proper, and so direct at any meeting of a board of directors, be laid out in the purchase of or in any government funds and securities, or upon such other security as may be approved of by the provisional directors, and be reconverted into money as occasion shall require; and such bills and securities, and the interest thereof, and the moneys arising from the sale thereof, shall be subject to the same provisions and trusts as the *492] moneys with which such bills and *securities shall have been purchased; but any such investment shall not be compulsory upon the said provisional directors, and they respectively shall not be answerable for any loss which shall be occasioned by such investment:

“Sixthly, that the said provisional directors shall cause proper books of account to be kept of all moneys which shall be placed to their credit under the provisions herein contained, and of all moneys which shall be received or expended in respect of the said undertaking, and of all other matters and things usually entered in books of account belonging to undertakings of a similar nature.

“Seventhly, that the said provisional directors for the time being shall have power, at any meeting of a board of directors, from time to time, to add to their number from among the subscribers to the said undertaking, and to supply in like manner any vacancies which may from time to time occur in the number of provisional directors, or in the office of chairman or deputy-chairman of the directors:

“Eighthly, that the said provisional directors for the time being shall keep a minute-book, in which shall be recorded all their proceedings; and all the minutes shall be signed by the chairman or deputy chairman, or one of them, or other director presiding at any meeting; and the minute so signed shall be, and be held, good and sufficient proof of the several facts and proceedings therein mentioned or referred to, in all actions, suits, controversies, and questions between and among the parties

to these presents and the said provisional directors for the time being, or between any of such provisional directors:

"Ninthly, that all questions at any meeting of a board of provisional directors, shall be decided by the votes of a majority of the provisional directors then and *there present, every such meeting of the provisional directors consisting of not less than three provisional directors; and such majority of votes then and there present, shall in all cases bind all the provisional directors, whether present or absent; and the acts of a board of provisional directors so assembled shall be deemed the acts of the whole board:

"Tenthly, that the said provisional directors for the time being at any meeting of a board of provisional directors from which the permanent chairman and both of the deputy chairmen hereby appointed shall be absent, shall have power to elect a temporary chairman, or shall from time to time choose one of the provisional directors present at such meeting to preside at any of their meetings, and to sign their minutes; and every chairman or deputy-chairman, whether permanent or temporary, presiding at any such meeting, shall, in case the votes, including his own, be equal, have a casting vote; and that a meeting of a board of provisional directors shall have full power, from time to time, to name and appoint such committee or committees, temporary or permanent, out of their own body, as they may think expedient, and to delegate to such committee or committees all such powers, consistent with the other provisions herein contained, as may appear necessary for the more ready conduct of their proceedings, or any of them,—which committee or committees may consist of such number, and have such quorum, and be subject to such regulations, as a board of provisional directors shall from time to time appoint:

"Eleventhly, that the said provisional directors for the time being shall have power to take such measures as they may deem expedient to carry the aforesaid railway communication, or any branches or branch connected therewith, or other arrangement hereby authorized, into effect, and particularly that they shall be *at liberty to cause such surveys to be made as they may think advisable, besides such as have already been made, and also estimates, as well of the expense of effecting such railway communication as aforesaid, as of the traffic likely to pass thereon; and, for the purposes aforesaid, and for all other purposes which the said provisional directors for the time being may deem desirable for the advancement of the said undertaking, or any part or parts thereof, or for examining or testing the correctness of the plans or calculations of the promoters of any competing or other line or lines of railway, or of any parties opposing the said undertaking, that they shall have full power to retain, engage, or appoint, bankers, counsel, solicitors, engineers, secretaries, brokers, agents, surveyors, clerks, servants, workmen, and others, and shall from time to time discontinue

the employment of such persons, or suspend and remove them, and re-engage or employ them or others in like manner: and power is also hereby given to the said provisional directors for the time being to enter into all such contracts and agreements as they shall deem advisable, for the making of surveys and estimates for the execution of the works now contemplated, or any part or parts thereof, and also for the construction and execution of the same works, or any part or parts thereof, in the event of an act or acts of parliament being obtained, or for any other purposes which they may deem necessary in reference to all or any of the purposes aforesaid, or in order to forward the said undertaking, not being in contravention of any of the provisions relating to railways, contained in the act passed in the eighth year of the reign of Her Majesty, Queen Victoria, intituled 'An act for the registration, incorporation, and regulation of joint-stock companies:' and, further, the said provisional directors shall be at liberty, and have full power, to enter into any bargains, *495] contracts, engagements, or agreements, with landowners, railway or canal companies, or corporations, or with the promoters of other similar or competing schemes which are authorized by the said last-mentioned act, and may in the judgment of the said provisional directors be advisable for facilitating the obtaining of an act of parliament, and for the accomplishment of the aforesaid railway communication, or any part or parts thereof, or for carrying into effect any other arrangements hereby authorized to be made; and that such provisional directors for the time being shall be at liberty, and have full power, to take such proceedings in parliament, or elsewhere, as they may deem expedient, for the purposes of opposing or altering the provisions of any bill or bills that may be solicited for the establishment of any railway or other work or undertaking which may in their judgment interfere with or tend to defeat the accomplishment of the said proposed railway communication, or to affect its interests, or which may compete therewith; and to make or support such application or applications to parliament as they may think fit, in the next session of parliament, or in any subsequent session or sessions, for any act or acts to carry into effect the said railway communication and the works connected therewith, or any part or parts thereof, and to fix upon, and from time to time alter, vary, or extend the *termini*, route, course, or line of the said railway communication, and the sites or spots of the stations, dépôts, and works connected therewith, and to determine whether, and how far, and to what extent, the said undertaking shall be carried out, deferred, or abandoned, and, in like manner, what branches, extensions, or junctions, if any, to, from, or with the said main railway shall form a part of the said undertaking; and, in case the first act to be obtained in relation to the said undertaking shall authorize the construction of a part or parts *496] only of the proposed railway communication aforesaid, with the respective branches thereof, that the said provisional directors for

the time being shall have power to make or support, in any subsequent session or sessions, such application or applications to parliament as they may deem advisable, for the construction of the remainder of the aforesaid railway communications, or any part or parts thereof, and generally to enter into, carry on, and make all such negotiations, arrangements, provisions, contracts, and agreements, and to make, do, and execute all such other acts, deeds, matters, and things whatsoever, in relation to the said undertaking, and to the application or applications to be made to parliament as aforesaid, as they the said provisional directors for the time being shall from time to time consider expedient :

“Twelfthly, that the said provisional directors for the time being shall have full power, out of the money which shall come to their hands by way of deposit or payment of calls, or otherwise in relation to the said undertaking, to pay and allow all such fees, costs, salaries, and recompenses to bankers, counsel, solicitors, engineers, brokers, and other persons who may be employed by them as aforesaid, or who may have been already employed or in any wise engaged in relation to the said undertaking, as they shall think fit, and generally to apply such moneys in and towards the fulfilment of any bargains, engagements, contracts, arrangements, or agreements into which they may have entered, or into which they are hereby empowered to enter for the purposes aforesaid, and towards the costs of any works or proceedings connected therewith, and in or towards the soliciting, supporting, or opposing such bill or bills in parliament as are hereinbefore mentioned, and in obtaining the necessary act or acts for carrying out the aforesaid railway communication, or any part or parts thereof, and generally in paying and [*497 satisfying all other *costs, charges, and expenses which they may sustain or incur, or which may have been already sustained or incurred, in relation thereto, or otherwise, under and by virtue of these presents :

Thirteenthly, that the moneys which shall be placed to the credit of the provisional directors for the time being, shall, in the first place (subject to the deposit to be made in the Court of Chancery as aforesaid), be subject and liable to indemnify and save harmless the provisional directors for the time being, and also the said persons parties hereto of the second part, and each and every of them, their and each and every of their heirs, executors, and administrators, estates, and effects, from and against all losses, costs, charges, damages, penalties, contracts, or agreements, which they or any or either of them respectively have incurred, suffered, sustained, expended, or become subject or liable to, or entered into, or shall or may at any time hereafter incur, suffer, sustain, expend, or become subject or liable to, or enter into, in respect or on account of the trusts, directions, and provisions herein contained on account of the said undertaking, or in consequence of any act, matter, or thing done or to be done by them respectively in relation

thereto, by virtue of their respective offices; and also that they the said present and future provisional directors, and the said persons parties hereto of the second part, or any or either of them, their or any or either of their heirs, executors, or administrators, shall in no case be answerable for the failure of any banker or other person in whose hands any of the moneys subscribed for the said undertaking shall be deposited, nor for any other loss than what may occur by means of their respective wilful default; nor shall any of them be answerable or accountable for *498] any others or other of them, but each for himself and *his own acts and deeds only; and the said provisional directors for the time being shall reimburse the said present and future provisional directors, and the said persons parties hereto of the second part, respectively, and their respective heirs, executors, and administrators, with and out of the moneys which may be placed to the credit of the said provisional directors for the time being, under the provisions herein contained, all and every such losses, costs, charges, damages, and penalties as hereinbefore are mentioned and intended to be provided against:

“ Fourteenthly, that no subscriber for any share or shares in the said undertaking shall, in any event, or under any circumstances whatever, be subject or liable to the payment of any larger or other sum or sums of money than what he, she, or they shall have severally subscribed:

“ Fifteenthly, that, in and by the said intended act or acts of parliament, it shall be distinctly and clearly provided and enacted that no call shall be made upon the subscribers to the said undertaking, or any of them, which shall exceed the sum of 5*l.* upon each share at any one time; and that there shall always be an interval of two calendar months at the least between any two calls; and that, in the same act, a provision shall be inserted for enabling the directors to be thereby appointed, to pay interest, at any rate not exceeding 4*l.* per cent. per annum, in respect of the deposit and call paid up in respect of every share in the said proposed undertaking, from the respective days on which such deposit or call respectively shall have been paid, and from thenceforth until the said proposed railway communication shall be completed and opened to the public,—such interest to accrue and be paid at such times *499] and places as the directors for the time being *appointed by the said recited act shall appoint for that purpose: provided always that no interest shall accrue to the proprietor of any share upon which any call shall be in arrear in respect of such share, or any other share to be holden by the same proprietor, during the period while such call shall remain unpaid:

“ Sixteenthly, that the said provisional directors hereby appointed, or to be appointed in pursuance of these presents, shall, and they are hereby authorized to, nominate, either out of their own body, or out of such subscribers possessing at least fifty shares in the said undertaking,

the first directors to be appointed in any act or acts of parliament to be obtained in pursuance of these presents :

“Seventeenthly, that in the event of the act or acts for which application shall be made in pursuance of these presents not being passed into a law, each of the said several persons parties hereto of the first part, and their several and respective heirs, executors, administrators, and assigns, shall and will well and truly bear, pay, and allow and discharge the expenses already incurred, or hereafter to be incurred, relative to the surveys and estimates for the said railway and other works, counsel's and solicitors' fees, costs, travelling expenses, and all other costs and charges of every description, incident to the proposed undertaking, and to the application or applications to parliament,—such expenses, costs, and charges to be computed and assessed rateably upon the amount of the several deposits in respect of the shares or sums taken and subscribed by each of the said several persons parties to these presents of the first part respectively :

“And, lastly, it is hereby agreed and declared between and by the parties hereto, that the said J. H. Whiteway, J. L. Scarbrough, and W. R. H. Jordan, their *executors and administrators, shall [*500 be the trustees for enforcing and giving effect to the covenants and agreements herein contained. In witness,” &c.

This subscription-contract relates to the above-mentioned scheme and prospectuses as varied by the managing committee as before mentioned. The said provisional directors mentioned in the said indenture are the same persons as constituted the said managing committee. Each of the said parties to the said indenture of the second part, signed, sealed, and delivered as his deed, this indenture.

The schedule referred to in the said indenture was a schedule then attached to it, consisting of a parchment book, of which every two consecutive pages were divided by lines into ten columns, headed respectively as follows,—“Subscriber's christian and surname, at full length,”—“Description,”—“Place of abode,”—“Usual signature of subscriber,”—“Amount of subscription,”—“Number of shares,”—“Amount paid up,”—“Seal,”—“Date of signature,”—“Witness.”

The managing committee had granted an extension of time to the plaintiff, at his request, for the execution of the subscription-contract ; and the plaintiff, during the extended time, duly executed the same on the 14th of November, 1845 ; and the plaintiff and the other allottees who executed the subscription-contract in respect of the 18,969 shares upon which the deposits had been paid, inserted in the said schedule the several particulars relative to their subscription required by the heading of the schedule to such subscription-contract : and the plaintiff, at the time of signing such subscription-contract, received from the managing committee scrip-certificates for twenty shares in the said company, in exchange for his said banker's receipt.

*501] The defendant also executed the subscription-contract, *as a subscriber for one hundred and fifty shares, on the 5th of December, 1845.

The estimate, as originally prepared by Mr. Locke, the company's engineer, for deposit with parliament, was 700,000*l.*; but, in consequence of the subscription-contract not having been signed by subscribers for the proportion of shares required by the standing orders of the houses of parliament, the said estimate was, upon conference with the committee, reduced to 650,000*l.*, by proposing to construct some parts of the railway with single lines, which had been intended to be double lines, and by striking off an intended branch to Crediton; and which latter estimate was used, as required by the standing orders of the house of commons, in the application to parliament hereinafter mentioned.

By the standing orders of the house of commons applicable to the case of a petition for leave to bring into that house, in the session of parliament beginning in the spring of the year 1846, a bill authorizing the construction of the said railway described in the said indenture, it was required that a plan and section, and duplicates of such plan and section, and also a book of reference, should be deposited for public inspection at the respective offices of the clerks of the peace for the county of Devon and city of Exeter, on or before the 30th of November, 1845; which plan should describe the line or situation of the whole work, and the lands in or through which it was to be made, maintained, varied, extended, or enlarged; and which section should show the surface of the ground marked on the said plan, and the intended level of the proposed work referred to one datum line; and which book of reference should contain the names of the owners, leasees, and occupiers of such lands respectively: and it was also required that the petition for
*502] such bill should be presented *within fourteen days after the first Friday in the said session of parliament; and that, before the presentation of the said petition, a subscription should be entered into, under a contract, to three-fourths of the amount of the estimate, and a sum equal to one-twentieth of the amount subscribed in the said contract should be deposited with the Court of Chancery: and, by the standing orders of the house of lords, a sum equal to 10 per cent. was required to be deposited with the Court of Chancery.

Great expenses had been incurred before the standing orders were complied with: the engineers' expenses are many thousand pounds.

With the view of complying with the standing orders of the houses of parliament, a plan and section and a book of reference were deposited at the office of the clerk of the peace for the county of Devon, on the 30th of November, 1845.

The number of shares for which allottees had executed the subscription-contract, was not equal to the number of shares required by the standing orders of the house of commons; and the committee, in order

to make up the requisite amount of subscription, procured thirty-five persons, the majority of whom were members of the committee (and the defendant was one of them), to execute the subscription-contract, purporting to become subscribers for certain shares respectively, amounting in the whole to the number of 5230 shares, and representing a capital of 104,600*l.*, and to have paid the deposit of 2*l.* 2*s.* upon each of such shares: and such thirty-five persons respectively inserted in the schedule the several particulars in relation to the said shares as was required by the heading of the said schedule, and as had been inserted by the plaintiff and the other persons who executed such subscription-
 *contract: and the said subscription-contract so executed was [*508
 used by the committee, upon the application to parliament, as evidence of a compliance with the said standing order,—the said subscription-contract having been so executed by the defendant and the said thirty-four other persons under a verbal agreement with the committee that the said thirty-five persons should not be required to pay any deposit, or to become subscribers for any shares, in the event of the act of parliament for which application was about to be made, not being obtained: and the said defendant and thirty-four other persons never did pay any deposit or other sum of money in respect of such 5230 shares, or take up any of such shares.

The arrangement before mentioned, under which the said thirty-five persons executed the agreement, was unknown to the public and the plaintiff.

A deposit to the amount required by the said standing orders to be made with the Court of Chancery, was, within the time required by those orders, made by the said managing-committee, with the said court, out of the said sum of 41,731*l.* 16*s.* paid to them as aforesaid.

In March, 1846, the managing-committee presented, in due time, a petition to the house of commons, for leave to bring in a bill for making a railway conformable to the petition so presented by them; and such petition was referred to a committee, to report if the standing orders of the house had been complied with; which committee reported that the standing orders had *not* been complied with, in respect of the plans required to be deposited; and no leave was given to bring in any bill, and in fact no bill was presented to either house of parliament.

The above facts having been proved, the lord chief justice directed the jury as follows:—"Upon the *undisputed facts of this case, the plaintiff is entitled to a verdict for 42*l.* It is proved, and not [*504
 disputed, among other facts, that the plaintiff subscribed for shares, and executed a subscription-contract, in an association which it was stated would have a capital of 700,000*l.*, to be raised by 35,000 shares of 20*l.*, upon each of which shares a deposit of 2*l.* 2*s.* per share was to be paid, and that the subscribers were to execute a subscription-contract, and of which it is stated in the prospectus of the 11th of October, that the al-

lotment of shares had been completed; that the subscription-contract was executed by the plaintiff on the 14th of November, the deposit on his shares having been previously paid, and at that time 18,969 shares only had been taken up by the allottees, and the allotment of the other shares was avoided by the shares not having been taken up in the manner required, within the time limited for that purpose; and by the certificate registered in July, 1846, it is stated that 18,969 shares was the number of shares which had been issued and the deposits paid upon. Under these circumstances, the project to which the plaintiff subscribed must be considered as determined; and the committee were not authorized to go to parliament at the plaintiff's expense; and under the circumstances stated in the evidence, the execution of the subscription-contract by the plaintiff has no material effect upon the plaintiff's right to a verdict, by reason that its terms were applicable to the concern as originally proposed, of 35,000 shares, which were never taken up by the public. The plaintiff, therefore, is entitled to your verdict for 42l."

The counsel for the defendant excepted to this direction; and insisted that his lordship ought not to have told the jury that the plaintiff was, upon the undisputed facts of the case, entitled to a verdict, nor that the *505] concern was at an end, so far as the plaintiff was concerned, by reason that 18,969 shares only had been paid upon, and that, under such circumstances, the managing committee were not authorized to go to parliament at the plaintiff's expense; nor that the said indenture had no material effect upon the case, by reason that its terms were applicable to the concern as originally proposed, of 35,000 shares, which were never taken up by the public; nor that the terms of the said indenture were applicable solely to the concern as originally proposed of 35,000 shares.

The jury having found a verdict for the plaintiff, damages 42l., and judgment having been entered up thereon, the defendant brought a writ of error; and the exceptions were now argued in the Exchequer Chamber, before PARKE, B., PATTESON, J., COLERIDGE, J., WIGHTMAN, J., PLATT, B., and ERLE, J.

Crowder (with whom was *Montague Smith*), for the plaintiff in error.—The lord chief justice was clearly wrong in telling the jury that the facts which were undisputed at the trial, necessarily led to a conclusion in favour of the plaintiff. Apart from fraud,—and none was suggested in this case,—where there has been a deed executed by the plaintiff, empowering the directors to deal with the funds, money had and received is not maintainable. The case of *Wontner v. Shairp*, 4 Com. B. 404 (E. C. L. R. 56), which the learned judge evidently had in his mind, turned upon the question whether the plaintiff had been induced to part with his money, and to execute the deed, by a wilful misrepresentation on the part of the directors. That undoubtedly is a very strong case;

but it has no bearing on this. [ERLE, J.—It went directly *to the jury on the ground of fraud there.] No question of fraud [*506 arose here; and the direction of the learned judge put the deed wholly out of consideration. There are many cases which show, that, in the absence of fraud, the deed must regulate the application of the money. Thus, in *Garwood v. Ede*, 1 Exch. 264,† an allottee of shares in a railway company provisionally registered, paid a deposit of 2*l.* 12*s.* 6*d.* per share, and signed the subscribers' agreement, which gave the provisional directors power to carry on the undertaking, or any part of it, or to abandon the whole or any part of it, and, out of the moneys which should come to their hands by way of deposit, or otherwise, to make such deposits or investments as might be required by the standing orders of parliament, and also to pay salaries, &c., and also the costs of obtaining acts of parliament, and generally to apply such moneys in paying and satisfying all other costs, expenses, or liabilities which they might incur in relation to the undertaking. The scheme proved abortive, and the company was dissolved under the provisions of the 9 & 10 Vict. c. 28. In an action to recover back the deposit,—it was submitted, on the part of the defendant, that the case was distinguishable from *Walstab v. Spottiswoode*, 15 M. & W. 501,†(a) inasmuch as the plaintiff had executed the subscribers' agreement, which precluded him from maintaining the action. POLLOCK, C. B., was of that opinion, and directed a verdict for the defendant. Upon a motion for a new trial, PARKE, B., said: "The directors are empowered to go on with the undertaking, or any part of it, and to employ the money which may come to their hands 'in paying and *satisfying all costs, charges, and expenses or liabilities, which [*507 they might sustain or incur in relation to the undertaking, or otherwise in pursuance of or consistently with those presents.' So that the effect of the agreement is, that, if the undertaking went on, the money was to be deposited under the standing orders of parliament, but, if it failed, the directors were empowered to dispose of it in payment of any expenses. Consequently, there never was a time when this was money had and received by the defendant for the use of the plaintiff." So, in *Clements v. Todd*, 1 Exch. 268,† the plaintiff signed an application for shares in a railway provisionally registered: the application contained the usual undertaking to sign the subscribers' agreement and parliamentary contract, when required: the plaintiff had no letter of allotment, but, having paid the deposit, received scrip-certificates in the usual form, stating that "the subscribers' agreement and parliamentary contract had been signed by the person to whom the certificate was issued:" the plaintiff, in fact, never signed either the subscribers' agreement or parliamentary contract: the scheme having proved abortive, the plaintiff brought an action for money had and received, to recover

(a) Decided mainly on the authority of *Nockells v. Crosby*, 3 B. & C. 814 (E. C. L. R. vol. 10), 5 D. & R. 751 (E. C. L. R. vol. 16).

back the deposit ; and it was held that he had placed himself in the same situation as if he had signed the subscribers' agreement and parliamentary contract, and could not recover. *Vane v. Cobbold*, 1 Exch. 799,† is almost identical with the present case. There, in an action by an allottee of a railway company, for the recovery of his deposit, it appeared that the company issued a prospectus which stated the capital to consist of 60,000 shares of 25*l.* each, and the plaintiff, after having paid *508] his deposit, executed the subscribers' agreement, which contained *the usual terms as to the disposition of the deposits : at the time when the plaintiff executed the deed, the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him : and it was held, that the withholding of the above fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. None of these cases had been decided at the time this cause was tried, except *Wontner v. Shairp*. In *Jones v. Harrison*, 2 Exch. 52,† in an action by an allottee of a railway company for the recovery of his deposit,—the project having been abandoned,—it appeared that the shares had been allotted to him upon the terms of the following letter of allotment,—“The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits, in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking. A subscribers' agreement and parliamentary contract, in such form and with such powers as the committee may think necessary, will be prepared, and lie at the company's offices for signature :” and it was held, that, upon the true construction of this letter of allotment, the directors had authority to lay out the deposits in such necessary expenses as had been incurred by them in the prosecution of the scheme, and, all the deposits having been so expended, that the *509] plaintiff was not entitled *to recover. *Jarrett v. Kennedy*, 6 Com. B. 319 (E. C. L. R. vol. 60), is also an authority to show that the proper question has not been presented to the jury in this case.

Kinglake, Serjt. (with whom was *Greenwood*), for the defendant in error.—The plaintiff below was entitled to recover, there having been a total failure of the consideration upon which he paid the deposit. The question is, what was the real contract between the plaintiff and the provisional directors of the proposed company. The plaintiff, on the 24th of September, 1845, in a letter in the form directed by a prospectus published in that month, applied for an allotment of fifty shares in a scheme such as that described in the prospectus, that is, with a capital of 600,000*l.* in 30,000 shares of 20*l.* each. On the 8th of October, the

managing-committee determined to increase the capital to 700,000*l.*, and the number of shares to 85,000. On the 9th, the plaintiff received an intimation that twenty shares had been allotted to him,—no reference being made in the letter to him of the altered amount of capital. The plaintiff was thus led to believe that he was to have twenty shares allotted to him in such a scheme as before advertised. On the 9th of October, therefore, there was a condition to pay on the 16th, in default of which the allotment was to be void, and the shares otherwise disposed of. It has been decided that an application for shares, if not responded to in the terms of the application, does not constitute a binding contract between the parties: *Wontner v. Shairp*, 4 Com. B. 404 (E. C. L. R. vol. 56), *Vollans v. Fletcher*, 1 Exch. 20.† On the 10th of October, there came a further prospectus, which stated that the allotment of shares was *completed, and that the letters had that day been posted. On [510 the 20th, for the first time, an act was done by the plaintiff from which a contract could be inferred,—he paid the deposit upon the shares allotted to him: and this could only give rise to a contract according to the terms of the letter of allotment: *Willey v. Parratt*, 8 Exch. 211;† *Chaplin v. Clarke*, 4 Exch. 403.† [PARKE, B.—The question is, whether the plaintiff can recover back the deposit, after having executed the deed,—his execution not having been obtained by fraud,—by which he has agreed that the provisional directors may do what they like with the money.] The deposit was paid upon the faith of the assertion by the directors that the plaintiff was to have shares in a concern in which there were 85,000 shares actually allotted, and that each of the allottees should pay 2*l.* 2*s.* towards the exigencies of the undertaking. The scheme so constituted never in fact had any existence. The total number of shares taken up by the allottees, and upon which the required deposit had been paid, was about 19,000 only. [PARKE, B.—The deed authorizes the appropriation of the money to the purposes of the railway. The plaintiff was bound by that deed, unless he can impeach it on the ground of fraud.] The deed which the plaintiff executed, was only applicable to the undertaking which he contemplated subscribing to. The deed must be construed with reference to the contract which had been entered into. The plaintiff, by signing the deed, gave the directors no authority to apply the money to any other scheme than one which was to go to parliament with a subscribed capital of 700,000*l.* [COLERIDGE, J.—The undertaking is fully described in the deed itself. Why construe it with reference to the previous parol contract? *PARKE, B.—There [511 is no provision that the capital shall amount to a given sum before the provisional directors can apply the money subscribed.] There is an express finding here, that the deposits were not paid upon all the shares subscribed. [PARKE, B.—That signifies nothing. COLERIDGE, J.—Do you contend, that, so long as the deposit upon a single share remains unpaid, the directors have no power to deal with the fund?] It is so contended. *Wontner v. Shairp*, 4 Com. B. 404 (E. C. L. R. vol. 56), is the

only case that is materially applicable. There the plaintiff undertook, in his application for shares, to accept a certain number, or such less number as the provisional committee might appropriate to him, *subject to the regulations of the company*, to sign the necessary legal documents, and to pay, when required, the deposit thereon. Upon the trial of an action brought to recover back the deposit paid, on the ground of fraud and failure of consideration, ERLE, J., told the jury that the plaintiff was entitled to a verdict, if the defendant knowingly made a false representation, which was a material inducement to the plaintiff to pay the deposit: and this direction was upheld by the court. WILDE, C. J., in delivering the judgment of the Court of Common Pleas in that case, said: (a) "The plaintiff, having asked for shares in a practicable scheme, received shares in a scheme that was impracticable, and which was rendered so by the act of the company, in refusing to allot more than 58,000 shares, although more than the whole 120,000 had been applied for by responsible parties. That which was allotted not being in truth that which the plaintiff had asked for, he was not bound to take it." In the last case upon the subject,—*Ashpitel v. Sercombe*, 5 Exch. 147,† 19 Law Journ. N. S. Exch. 82, it was held that an allottee of shares in an *512] undertaking* for the formation of a railway, which afterwards proves abortive, and is abandoned, without fraud or misconduct, may maintain an action for money had and received against a member of the committee of management, to recover back the amount of his deposit paid to the credit of such committee, unless it can be shown that he has consented to or acquiesced in the previous application of the money by the committee to the purpose of the undertaking; and it is for the defendant to prove such consent or acquiescence.

Crowder, in reply, was stopped by the court.

PARKE, B.—I am of opinion, and all my learned brothers agree with me, that the judgment in this case must be reversed, and a *venire de novo* awarded. Whether the jury would have been warranted in finding fraud, if all the facts had been submitted to them, it is unnecessary to say. *Wontner v. Shairp* proceeded entirely on the ground of fraud,—ERLE, J., having told the jury that the plaintiff was entitled to a verdict, if the defendant knowingly made a false representation which was a material inducement to the plaintiff to pay the deposit: and the court thought that direction correct. Here, the question of fraud was not submitted to the jury at all: but it was contended, that, upon the state of facts existing before the execution of the subscription-contract, the money was paid upon a consideration which had failed. It is unnecessary to say how the case would have stood if no deed had been executed; for, it is clear that the plaintiff, by executing the deed, authorized the committee to dispose of the money in the manner thereby contemplated; and, if the powers given to the committee by the deed were *bonâ fide*

(a) 4 Com. B. 441 (E. C. L. R. vol. 56).

executed, the plaintiff could not complain of their exercise of *them. The lord chief justice thought that this deed did not [*518 apply to the scheme upon which the plaintiff paid his money. But we are all of opinion that the deed must be looked at by itself. Its terms are express. It states that the plaintiff, amongst others, agreed to subscribe certain sums for the purpose of making and maintaining the railway in question, with power for the provisional directors to alter and vary the termini, &c., and to make application to parliament for such purposes as they should think fit. Then there is a provision that a capital *not exceeding* 700,000*l.* shall be raised (not that *it shall amount to that sum*),—that the deposits shall be paid in a given manner,—and that the money so raised shall be subject to the disposal and control of the directors. And the eleventh clause of the deed provides that the provisional directors shall have power to take such measures as they may deem expedient, to carry the undertaking into effect, and gives them most extensive powers as to the applying to parliament, and generally for the disposal of the funds of the company to the furtherance of the undertaking. The plaintiff, having executed that deed, has agreed, under his hand and seal, that the provisional directors shall do all that is therein contained; and by that deed he is bound, unless he was induced by fraud or misrepresentation to execute it. The question of fraud was not left to the jury. It has been contended, that the directors had no power under the deed to deal with any part of the money until the whole amount had been subscribed. I do not, however, agree in that construction. If such had been the plaintiff's intention, he should have taken care not to execute a deed which did not express it. No such express stipulation is to be found on the face of the deed; and none can be implied.

*For these reasons, we are unanimously of opinion that the lord chief justice was wrong in the direction which he gave to [*514 the jury, and, consequently, that there must be a

Venire de novo.

END OF MICHAELMAS VACATION.

FOURTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

THE Judges who sat in Banco during this Term were,
JERVIS, C. J. **CRESSWELL, J.**
MAULE, J. **WILLIAMS, J.**

JONES v. HUTCHINSON. *Jan. 14.*

A declaration stated, that, in consideration that the plaintiff would make for the defendant such a number of aerometers as the defendant should from time to time require, and would deliver the same when completed, the defendant promised to accept and to pay for the same; that the defendant required the plaintiff to make 1000 aerometers; that the plaintiff did make 500, and was ready and willing to deliver them, and was ready to complete the other 500 within a reasonable time; but that the defendant refused to accept or to pay for any part of those made, and discharged the plaintiff from continuing the manufacture of the residue.

At the trial, proof was given, that the defendant had ordered 2000 aerometers, that 300 had been delivered and paid for, and that the plaintiff had prepared materials for making the rest, but that the defendant had discharged him from so doing.

The variance being objected to at the trial, the lord chief justice allowed the plaintiff to amend his declaration, by stating the contract in conformity with the proof, unless the defendant's attorney would produce an affidavit that the defendant would be prejudiced in his defence by such amendment:—Held, that the amendment was warranted by the 3 & 4 Will. 4, c. 42, s. 23.

Where the opposite party waives his right to have an amendment formerly made at the time, it is enough that it is made within a reasonable time,—within the time allowed for moving,—provided the amendment, when made, is in accordance with the judge's note.

An affidavit of the defendant's attorney stated, that he was taken entirely by surprise by reason of the amendment being permitted to fit the evidence given of an order for 2000 aerometers ; and that, had the declaration originally been framed as amended, he would have been able to show that such an order could not, from the nature of the article, have been given :—Held, not an “affidavit of surprise,” or sufficient to show that the defendant could have been prejudiced in his defence by the amendment.

ASSUMPSIT. The declaration stated, that, on the 1st of January, 1845, in consideration that the plaintiff, at the request of the defendant, would *manufacture and make for him certain chattels, to wit, [*516 such a number of aerometers as the defendant should from time require to be made, at and for certain reasonable prices to be paid by the defendant to the plaintiff in that behalf, and would deliver the same to or for the defendant, when completed, and when required by the defendant so to do, the defendant promised the plaintiff to accept the said chattels of the plaintiff when so manufactured and made, and pay him for the same the reasonable prices aforesaid. Averment, that afterwards, to wit, on the day and year aforesaid, the defendant required the plaintiff to make divers, to wit, one thousand, aerometers, in pursuance of his said promise; and that the plaintiff, confiding in the said promise of the defendant, *did* afterwards, and within a reasonable and proper time in that behalf, to wit, on the day and year aforesaid, *manufacture and make part of the said aerometers so ordered*, to wit, five hundred, *and was* then, and within a reasonable time in that behalf, *ready and willing to deliver the same* to or for the defendant, and then, to wit, on the day and year aforesaid, in part manufactured and made the remainder, to wit, five hundred others of the said aerometers so ordered as aforesaid, and was then ready and willing to complete the same within a reasonable time in that behalf for the defendant, according to the said promise, *—of all which the defendant then had notice; yet that the de- [*517 fendant, not regarding his said promise, did not nor would accept the said aerometers so made as aforesaid, or any part thereof, nor did nor would he pay for the same, or any part thereof, within the reasonable times aforesaid, the same amounting to a large sum, to wit, 800*l.*, or any part thereof, but then, and on the day and year aforesaid, and before a reasonable time had elapsed for the plaintiff to complete the remainder of the said aerometers, wholly refused to accept or pay for the said aerometers so made, or any or either of them, or to accept or pay for any other aerometers or aerometer to be manufactured or made by the plaintiff, and gave the plaintiff notice, and required him, to cease from making the residue of the said aerometers which were then in the course of being made, and wholly discharged him from continuing the manufacture thereof; whereby the plaintiff had lost divers great gains which he might and otherwise would have made from the completion of the said agreement by the defendant as aforesaid, and divers large quantities of labour and materials which the plaintiff bestowed and employed in the manufacture of the said aerometers, became and were wholly lost and useless to the plaintiff.

The declaration also contained the common counts.

The defendant pleaded, amongst other pleas, non assumpsit.

The cause was tried before JERVIS, C. J., at the sittings in Middlesex after last Michaelmas term, when the plaintiff called a witness named

Barton, a workman in the plaintiff's employ, who stated that the defendant had ordered the plaintiff to make for him two thousand aerometers according to a model produced by him; and that, in pursuance of that order, about three hundred were made, and materials provided for a great many more; that these three hundred had been delivered, *518] and paid for; but that the defendant refused to accept or to pay for the remaining seventeen hundred.

On the part of the defendant, it was insisted that there was a variance between the declaration and the proof; inasmuch as the declaration alleged a contract to make one thousand aerometers, and that the plaintiff had made, and *was willing to deliver*, a portion of them, but that the defendant refused to accept them; whereas, the proof was of *a delivery of part*, and a refusal to accept the residue.

The plaintiff's counsel thereupon asked to be allowed to amend his declaration, under the statute 3 & 4 W. 4, c. 42, s. 23, by making it accord with the proof. This was opposed on the part of the defendant, on the ground that it would totally alter the defendant's position; for that, reading the declaration in its original state, no one would suppose that the case was one which was to be taken out of the operation of the statute of frauds by proof of a part delivery, and so the defendant would be deprived of his defence.

The lord chief justice proposed that the trial should be postponed, upon the production of an affidavit showing that the defendant was prejudiced in his defence by the amendment which was asked for. The defendant's attorney not being prepared to do this, his lordship allowed the amendment,—which it was agreed should be made *in the course of the afternoon*.

The defence was, that the order had been given by the defendant, not for himself individually, but on account of a gas-company, which had proved abortive. The defence, however, failed: and a verdict was found for the plaintiff, damages 150*l*.

Eight days after the trial, the plaintiff's attorney delivered to the defendant's attorney, the following amended count:—

*519] “For that whereas, heretofore, to wit, on the 1st of *January, 1845, in consideration that the plaintiff, at the request of the defendant, would manufacture and make for him certain chattels, to wit, two thousand aerometers, at and for certain reasonable prices to be paid by the defendant to the plaintiff in that behalf, and would deliver the same to or for the defendant when completed, and when required by the defendant so to do, the defendant promised the plaintiff to accept the said chattels of the plaintiff, when so manufactured, and pay him for the same the reasonable prices aforesaid: And the plaintiff avers, that, afterwards, to wit, on, &c., the defendant required the plaintiff to make the said aerometers in pursuance of his said promise; and the plaintiff, confiding in the said promise of the defendant, did afterwards, and

within a reasonable and proper time in that behalf, to wit, on, &c., aforesaid, manufacture, make, and complete part of the said aerometers, to wit, three hundred thereof, and was then, and within a reasonable time in that behalf, ready and willing to deliver the same to or for the defendant, and then, to wit, on, &c., aforesaid, in part manufactured and made the remainder, to wit, one thousand seven hundred other of the said aerometers, and was then ready and willing to make, manufacture, and complete the said remainder of the said aerometers, within a reasonable time in that behalf, for the defendant, according to his said promise,—of all which the defendant then had due notice: And the plaintiff further saith, that, although afterwards, and after the said part of the said aerometers had been so manufactured, made, and completed as aforesaid, and before the breach of the said promise of the defendant hereinafter mentioned, and long before the commencement of this suit, to wit, on, &c., aforesaid, and on divers other days between that day and the commencement of this suit, he, the plaintiff, delivered to the defendant, and the defendant then accepted and received of and *from the plaintiff, the said aerometers so manufactured, made, and [*520 completed as aforesaid, and although the defendant did then pay to the plaintiff divers large sums of money, amounting, to wit, to 500*l.*, as and for the price of the said aerometers so manufactured, made, and completed as aforesaid: Yet the defendant, not regarding his said promise, afterwards, and long before the commencement of this suit, and before a reasonable time had elapsed for the plaintiff to manufacture, make, and complete the said remainder of the said aerometers, to wit, on, &c., wholly refused to accept or pay for the said remainder of the said aerometers, and then gave the plaintiff notice, and required him, to cease from manufacturing, making, and completing the said remainder of the said aerometers, and then wholly discharged him from continuing the manufacture, making, and completion thereof; whereby the plaintiff hath lost divers great gains which he might, and otherwise would, have made from the completion of the said agreement by the defendant as aforesaid; and divers large quantities of labour and materials, which the plaintiff bestowed and employed in manufacturing the said remainder of the aerometers, became and were wholly lost and useless to the plaintiff."

Montague Chambers now moved for a new trial, on the ground that the amendment had been improperly allowed: and that the plaintiff had not availed himself in due time, of the permission given him to amend. He produced an affidavit of the defendant's attorney, who deposed that the cause was tried on the 5th of December last, and that, although it was agreed that the proposed amendment should be put in proper form in the course of the afternoon, the amended count was not delivered to him by the plaintiff's attorney until *the 12th; that, in order to sup- [*521 port the first count of the declaration as framed at the trial, the

deponent was informed and believed that it was necessary for the plaintiff to prove a general order for the manufacture of aerometers; that he had no conception that such alteration of the declaration as that permitted by the lord chief justice at the trial, would have been allowed to be made; that he was, as the attorney for the defendant, taken entirely by surprise by reason of the amendment being permitted, to fit the evidence given by the witness, Barber, of an order for two thousand aerometers; and that, had the declaration originally been framed as amended, he would have been able to show that such an order *could* not, from the nature of the article, have been given.

It is impossible to read the declaration in its original state, and as amended, without seeing that the whole character of the contract is changed by the amendment, and that the defendant must necessarily have been thereby prejudiced in his defence. As it originally stood, the plaintiff could only have supported the declaration by proving a contract in writing. The substitution of an entirely different contract, to be sustained by a different sort of proof, clearly is not within the contemplation of the statute. [JERVIS, C. J.—The statute is to be construed most liberally, seeing that the plaintiff can have but one count upon the contract.] Giving the statute the largest and most liberal construction, an amendment which starts an entirely new case, is not within its purview. [MAULE, J.—The amendment is to be one which is not “material to the merits of the case,” and one by which the defendant “cannot have been prejudiced in his defence.” The merits here were, whether the defendant had improperly refused to accept aerometers *522] which he had contracted *with the plaintiff to make for him. I think the amendment was in a particular which clearly was not material to the merits.]

The statute requires that the amendment be made *forthwith*. The proposed amendment here was, by striking out a few words, and adding a few; and it was agreed that it should be formally made in the course of the afternoon. It now turns out that the amended count was not communicated to the defendant's attorney until a week after. [JERVIS, C. J.—It was late in the afternoon when the discussion took place: the amendment could not be made on the instant.] At all events, it should have been made before the jury gave their verdict. If the amendment is one which requires such a delay, and which cannot be made without the aid of a special pleader, it obviously is not such a one as the statute contemplated. [JERVIS, C. J.—The amended count is precisely what Mr. *Hawkins* at the time suggested. CRESSWELL, J.—Where the defendant waives his right to have the amendment formally made at the time, it is enough that it is made within a reasonable time,—within the time allowed for moving,—provided the amendment, when made, is in accordance with the judge's note.]

The affidavit shows that the defendant's attorney was taken by sur-

prise. [CRESSWELL, J.—It only states that the attorney was surprised “by reason of the amendment being permitted,” not that he was surprised at the evidence which was given. MAULE, J.—It does not deny that an order was given for two thousand aerometers.]

Per Curiam,—

Rule refused.

*DAWSON v. COLLIS and Another. Jan. 16. [*528

Plea,—to an indebitatus count for goods sold and delivered, goods bargained and sold, and on an account stated,—as to 191*l.*, parcel, &c., that the defendants made the promise in respect of goods, to wit, 31 pockets of hops, bargained and sold by the plaintiff to the defendants; that, at the time of the promise, the plaintiff produced and showed the defendants a sample, and promised to deliver the hops equal thereto; that they made their promise as to the said 191*l.*, parcel, &c., on the faith, and in consideration of the said promise, and not otherwise; and that the hops were not equal to the said sample; wherefore the defendants refused to accept them:—Held, bad, on special demurrer, as amounting to non assumpsit.

Quære, whether the plea would not have been also bad for attempting to limit the plaintiff's proof to goods bargained and sold, if specially demurred to on that ground.

Upon a sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them, on the ground that they do not correspond with the sample, unless there be an express condition to that effect; but must resort to a cross-action, or rely on the non-correspondence with sample as a ground for reduction of damages.

ASSUMPSIT for goods sold and delivered, goods bargained and sold, and for money found due upon an account stated.

The defendants pleaded,—first, except as to 17*l.*, non assumpsit.

Secondly,—as to the causes of action in the declaration mentioned, so far as the same relate to the sum of 191*l.* 9*s.* 2*d.*, parcel of the moneys in the declaration mentioned (no part of the said sum of 191*l.* 9*s.* 2*d.* being parcel of the said sum of 17*l.* in the first plea above excepted),—that the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., was and is claimed by the plaintiff to be due and owing to him from the defendants, and the defendants became and were indebted therein as in the declaration alleged, and made their said promise as in the declaration alleged, so far as the same relates to the said sum of 191*l.* 9*s.* 2*d.*, for and in respect of divers goods and chattels, to wit, thirty-one pockets of hops, then, to wit, on the day and year in the declaration *mentioned, bargained and sold by the plaintiff to the defendants, and at their request, as in the declaration alleged: that, [*524 before and at the time of the said bargain and sale, and of the making of the said promise of the defendants in the declaration mentioned, as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., the plaintiff produced and showed to the defendants a certain sample of the said hops, and then promised the defendants to deliver the said hops to the defendants, and that the whole of the said hops were equal in quality and description to the said sample: that the defendants then bargained for and bought the said hops, and every part thereof, and made the said promise in the declaration mentioned as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c.,

on the faith and terms, and in consideration of, the said promise of the plaintiff, and not otherwise: that the said hops were not, at the time of the making of the said bargain and sale, and of the making of the said promise of the defendants, nor were they at any time since until or at the time of the commencement of this suit, nor have they ever since been, nor are they, equal in quality and description to the said sample; but, on the contrary thereof, the same were, and every part thereof was, of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendants; wherefore the defendants did not nor would accept the said hops, or any part thereof, and then broke their said promise in the declaration mentioned, so far as related to the said sum of 191*l.* 9*s.* 2*d.*, as they lawfully might for the causes in that plea aforesaid,—verification.

Special demurrer, assigning for causes, amongst others,—that the plea confesses the cause of action, but does not avoid the same, inasmuch as the breach of a warranty is no cause for rescinding an executed contract of sale;—that the plea admits that the property *in the
*525] hops had passed, and in effect claims to retain both the hops and their price;—that the plea does not show that the defendants ever rescinded the contract of sale, or offered to give up the hops to the plaintiff, or that they had no opportunity, before the commencement of this action, for so doing;—that the statement that the defendants would not accept the said goods and broke their promise to pay the price, is not equivalent to a statement that the defendants elected to avoid the contract, and gave notice thereof to the plaintiff; or, if the said statement *may* bear that meaning, at least it is doubtful whether it is intended to bear it,—that the plea does not confess the statement in the declaration, that the defendants were indebted for goods bargained and sold, and promised, in consideration thereof, to pay on request, but is an indirect and argumentative traverse thereof, and amounts to the general issue, and ought to have concluded to the country, and not with a verification; or leaves it uncertain whether the defendants mean to confess or deny the said statement;—that the only contract confessed in the plea, is one whereby the delivery of the goods by the plaintiff was to be part of the consideration for the price, and whereon the defendants could not become indebted until the goods were delivered, and then not for goods sold, but only for goods sold and delivered, and it was also a contract for the sale of goods of a certain quality and description (and not of certain specific goods), under which the property could not pass, in the event alleged in the plea, of the goods being not according to the warranty, and not being accepted, &c. Joinder in demurrer.(a)

(a) The points for argument on the part of the defendants, were,—“That the fourth plea affords and discloses a good defence to the causes of action to which it is pleaded, and is not invalid for any of the causes assigned in the demurrer: that it well and sufficiently admits a bargain and sale of the hops therein mentioned, and a promise to pay the price of them, and alleges facts which justify the non-performance of that promise: that, to an indebitatus count for goods bargained and sold, it is a good plea to say that the goods were sold by sample, and that they did not correspond with, and were not equal to the sample.”

**Lush*, in support of the demurrer.—The plea in question is bad in substance, and also in form, as being an argumentative traverse of the promise alleged in the declaration. The plea states a bargain and sale of hops,—whether specific hops, or hops generally, is uncertain. If the plea means to set up a warranty, it is clearly bad: for the vendee cannot refuse to perform his promise because there has been a breach of warranty; such breach of warranty being merely the subject of a cross-action, or a ground for mitigation of damages: *Mondel v. Steel*, 8 M. & W. 858.† If it is to be said that the goods were sold with a condition that they should equal the sample, the defendants would have had a right to rescind the contract, and return the goods within a reasonable time; and then no such promise as that alleged in the declaration would have arisen. Here, however, the defendants by their plea admit that they broke the promise mentioned in the declaration: it therefore only amounts to an argumentative denial of such promise. The plea is also bad for this:—The plaintiff by his declaration claims 1000*l.* for goods sold and delivered, and on an account stated, as well as for goods bargained and sold; and the plaintiff was entitled to recover the whole upon any one of the counts. But the defendants, by their plea, restrict the sum as to which it is pleaded, to the count for goods bargained and sold, and so attempt to prevent the plaintiff from recovering that sum on the other counts.

Hawkins, *contrâ*.—The last objection is clearly untenable. There is, in truth, but one count in the declaration. The plaintiff may either traverse or new **assign*. The objection, at all events, should have been pointed out as ground of special demurrer. [*CRESSWELL*, J.—You might have pleaded, “as to so much of the declaration as applies to goods bargained and sold.” You are endeavouring, by this plea, to limit the effect of the declaration to goods bargained and sold,—to shut out the plaintiff from proving that the whole 1000*l.* is claimed for goods sold and delivered.] The plea affords a substantially good defence. [*MAULE*, J.—What do you say to the case of *Street v. Blay*, 2 B. & Ad. 456? It was there suggested by the Court of King’s Bench, that the purchaser of a *specific chattel* under a warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorizing the return, or consent of the vendor: but that, where the contract is executory only when the chattel is received,—as, where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose,—the vendee may rescind the contract, if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of owner over them, as, by selling them. The principle there laid down has, in subsequent cases, been recognised and somewhat expanded.] No case has yet de-

cided, that, where goods are sold with a warranty that they are equal to the sample, the vendee is bound to accept them if they do not equal the sample, and resort to a cross-action. This plea is analogous to a plea of fraud. [MAULE, J.—No fraud is charged. This is a contract, and not a condition. The remarks of Lord TENTERDEN, in *Street v. Blay*, *528] are well worthy of consideration. “Lord ELDON,” *he says, “in the case of *Curtis v. Hammond*, 3 Eap. N. P. C. 83, is reported to have said that ‘he took it to be clear law, that, if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty; or he might *return the horse, and bring an action to recover the full money paid*: but, in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value:’ and he proceeds to say, that, if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence, in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr. Starkie’s excellent work on the Law of Evidence, part iv. p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether, by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that, where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article, and revest the property in the vendor, and recover the price as money paid on a consideration *529] which has failed, but must sue upon the warranty, *unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether,—*Weston v. Downs*, 1 Dougl. 23; *Towers v. Barrett*, 1 T. R. 133; *Payne v. Whale*, 7 East, 274; *Power v. Wells*, 1 Dougl. 24 n.; *Emanuel v. Dane*, 3 Campb. 299,—where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered by way of barter for another received. If these cases are rightly decided,—and we think they are; and they certainly have been always acted upon,—it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of

consideration: and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action: *Cormack v. Gillis*, cited 7 East, 480; *King v. Boston*, 7 East, 481, n.: and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid." It must be admitted that there was at one time such a promise as is alleged in the declaration: but, when the defendant found that the goods were not equal to the sample, he had a right to decline to take *them. [WILLIAMS, J.—The distinction between a war- [*530 ranty and a condition is taken in *Young v. Cole*, 3 N. C. 724, 4 Scott, 489. There, the plaintiff, a stockbroker, sold for the defendant four Guatemala bonds, and paid him the amount: the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; whereupon the plaintiff took them back, and reimbursed the purchaser: and it was held that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant. And TINDAL, C. J., said: "The plaintiff delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock-Exchange. It seems, therefore, that the condition on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

Willes, in reply, referred to *Rhodes v. Turner*, 3 Exch. 607.† There, to counts for work and labour, money paid, interest, &c., the defendant pleaded,—first, "as to 48*l.*, parcel of the moneys in the declaration mentioned, and the causes of action in respect thereof," the non-joinder of a co-contractor,—secondly, as to 15*l.*, parcel of the residue, and the causes of action in respect thereof, that the plaintiffs sought to recover fees, charges, and disbursements, as attorneys, and that no signed bill had been delivered: and the plea in *abatement was held good, though not pleaded to any particular count or sum; but the [*531 second plea was held bad, as it afforded no answer to the claim for interest. [JERVIS, C. J.—That was on special demurrer. CRESSWELL, J.—In the notes to *Cutter v. Powell*, in *Smith's Leading Cases*, vol. II. p. 15, it is said that "*Poulton v. Lattimore*, 9 B. & C. 259 (E. C. L. R. vol. 17), 4 M. & R. 208 (E. C. L. R. vol. 16), and *Street v. Blay*, 2 B. & Ad. 456, have established, beyond all doubt, that, even where there is an express warranty, and a breach of that warranty is the defect of

consideration complained of, the defendant may, in an action for goods sold and delivered, give evidence of the breach of warranty, in reduction of damages." The result of the authorities there cited, seems to be, that, in case of a non-compliance with a warranty, the vendee may refuse to receive the goods, bring a cross-action for the breach of warranty, or give it in evidence in reduction of damages.]

JERVIS, C. J.—I am of opinion that this plea is no answer to the action. I am inclined to think, according to the principle of *Street v. Blay*, that, on the sale of a specific article (as alleged in this plea), the buyer has no right to repudiate the article if it does not correspond with the sample: but that his proper remedy is, to bring a cross-action on the warranty, or to set up the breach in reduction of damages. But it is unnecessary upon this occasion to express any opinion upon that point; because, if proof of the warranty, on the part of the plaintiff, be a necessary condition of his recovering, there is no promise on the part of the defendant to pay, unless the specific article corresponds with the sample: and that is a defence under non assumpsit. I entertain *some doubt as to the form of the plea; but that, at all *532] events, would only be ground of special demurrer. The case of *Parsons v. Sexton*, 4 Com. B. 899 (E. C. L. R. 56), is expressly in point, except that there, there was no delivery of the steam-engine.

MAULE, J.—I am of the same opinion. Mr. *Hawkins* says that the law confers upon a vendee the right of refusing to take or pay for the article purchased, where it turns out not to be equal to the sample; and that this plea raises a defence of that sort. I am disposed, however, to think that such a state of circumstances does not arise upon this plea. But, supposing the plea is equivalent to a plea setting up the same contract as that declared upon, but inserting a condition, that, if the goods were not conformable to the sample, the defendant should be at liberty to decline them,—I think it would amount to a plea in denial of there having been such a sale as would raise a debt, and thus a circuitous way of pleading the general issue. Certainly there is language used in some of the cases as to the acceptance of an article sold with a warranty, which raises some doubt whether in the case of a bargain and sale of a specific chattel, with a warranty, but without a condition such as that suggested, the principle of *Street v. Blay* applies. But it seems to me that the principle of *Street v. Blay* ought to be extended, and that the just and convenient thing is, that the vendee should have an action for the breach of warranty, or that he should give it in evidence in reduction of damages, as in *Allen v. Cameron*, 1 C. & M. 832,† and several other cases. If it were necessary to decide the point on the present occasion, I should have no hesitation in holding the law to be so. But there is *ground enough for deciding against the validity of *533] this plea, without determining that matter.

CRESSWELL, J.—I am of the same opinion. I agree with the lord

chief justice, that, if it be part of the case to be proved by the plaintiff, that the hops in question were sold with a warranty that they were equal to the sample, that matter of defence arises upon the general issue. The contract was not made with reference to a sale of a specific article. Where the sale is of an individual and specific thing, the vendee can only defend himself altogether against an action for not accepting it, if the thing be utterly worthless,—as in *Poulton v. Lattimore*,—or in part, by giving the breach of warranty in evidence in reduction of damages. The note in 2 Smith's Leading Cases, 15, does not, I apprehend, mean to assert that the three points there mentioned were *decided* by *Poulton v. Lattimore* and *Street v. Blay*; but only that they may be inferred from those cases.

WILLIAMS, J.—I am of the same opinion. Either the plea amounts to a denial that the goods were bargained and sold, and so amounts to the general issue; or it admits the bargain and sale, and seeks to justify the non-acceptance of the goods on the ground of a breach of warranty. It is clear the goods were bargained and sold; and that the property passed: and there is nothing stated in the plea to justify the defendant in rescinding the contract; though it shows a partial defence, which might entitle him to a reduction of damages. The plea, therefore, is clearly bad. I also think the plea has several other objections in point of form, to which, however, it is unnecessary now to advert.

Judgment for the defendant.

If upon a sale with a warranty, or if by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in that case the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the vendee to maintain an action for money had and received, if the purchase-money has been paid. The consequences are the same if the sale be absolute, and the vendor afterwards consents, unconditionally, to take back the property; but if the sale be absolute, and there be no such subsequent consent of the vendor, the contract remains open, and the vendee is put to his action on the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time. *Thornton v. Wynn*, 12 Wheaton, 183.

Where there is a warranty of quality and offer to return the goods in due time, if the warranty is violated, the vendee is not obliged to pay the price whether the vendor knew of the defect of quality or not: the *offer* in such case is immaterial. *Hyatt v. Boyle*, 5 Gill & Johnson, 110.

If a sale be absolute with a warranty of soundness, and the vendor refuse to take it

back, the vendee cannot rescind the contract, but must bring an action on his warranty; unless the vendor knew of the unsoundness and the vendee gave him reasonable notice. *Kase v. John*, 10 Watts, 107.

The cases in which a party must return or offer to return the property in a reasonable time, are cases where he wishes to rescind the sale, and recover back the whole price paid, or cases of conditional sales, where the thing about to be sold is taken on trial, with liberty to the purchaser to return it, if he dislikes it, in a stipulated period. *Ferguson v. Oliver*, 8 Smedes & Marshall, 332. The purchaser of a chattel may, by tender back, rescind the contract without the consent of the seller, where the right to return the property was a part of the original contract, where there has been fraud, or where there has been an entire failure of consideration. *Curtis v. Walker*, 2 Richardson, 40. Where a sale of personal property is absolute, and there is no fraud, the vendee cannot compel the vendor to receive back the article if it proves deficient in quality; but he must resort to his action upon the warranty, if there were one. *West v. Cutting*, 19 Vermont, 536.

Upon the sale of goods by sample there is an implied warranty by the seller that the bulk of the commodity is equal in quality to the sample exhibited to the buyer; and if it does not cor-

respond, the purchaser may refuse to receive it, or if received, he may return it in a reasonable time allowed for examination, and thus rescind the contract. But if he keep the goods and use them as his own, after time allowed for inspection, he cannot repudiate the purchase, though he may maintain an action for a breach of the implied warranty. *Magee v. Billingsby*, 3 Alabama, 679; *Waring v. Mason*, 18 Wendell, 425. In the case of an executory contract to furnish an article for a certain purpose, the

article may be returned within a reasonable time after it has been found not to satisfy the contract, although the contract contains no stipulation for such return. *Freeman v. Clute*, 3 Barbour Sup. Ct. Rep. 424. In case of the sale of goods of a particular quality, if goods of a different quality are delivered the buyer is not bound to receive them; but he cannot receive a part and refuse the residue: he must rescind the contract as to the whole, or he cannot in any part. *Shields v. Pettee*, 2 Sandf. Sup. Ct. 262.

*534] *BOGG v. PEARSE and Another. Jan 16.

Indebitatus assumpsit will not lie against commissioners under a local paving act, for salary of officers whom the act authorizes them to appoint at a salary to be paid out of the rates to be raised thereunder. The proper remedy is, either by an action upon the case, or a *mandamus*.

ASSUMPSIT, by a beadle or street-keeper, against two of the commissioners under a local paving-act, for arrears of salary.

The declaration stated that the plaintiff, by T. A. J., his attorney, complained of John Pearse and Jesse Curling, who, before and at the time of the commencement of this suit, were, and still remained, two of the commissioners for the time being, appointed, and acting as such, under and by virtue of the statute made and passed in a session of parliament holden in the eighth and ninth years of the reign of Her Majesty, Queen Victoria, intituled "An act for more effectually paving, cleansing, lighting, and otherwise improving the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey," the defendants in this suit, who had been summoned as such commissioners as aforesaid, to answer the said plaintiff, by virtue of a writ issued on, &c.: For that the said commissioners for the time being appointed and acting as such commissioners under and by virtue of the said statute, on, &c., were indebted, as such commissioners as aforesaid, to the plaintiff, in 500*l.*, for wages or salary then due and of right payable by and from the said commissioners, as such, to the plaintiff, for and in respect of his having before then held and filled, for a certain long space of time before then elapsed, the office of street-keeper in and for the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey, under and by virtue of an appointment of him as such street-keeper as aforesaid, at wages
*535] or salary in that behalf, *before then duly made by the said commissioners, under and by virtue of, and according to, the provisions of the said act of parliament; and that the said commissioners, as such, afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said sum of money, on request; yet that the said commissioners had disregarded their said several promises, and had not paid the said moneys, or either of them, or any part thereof, to the plaintiff's damage of 500*l.*;

and thereupon the plaintiff, who sued the defendants as such commissioners as aforesaid, brought suit, &c.

Third plea,—as to so much of the sum in the declaration mentioned as was claimed by the plaintiff for wages due and owing to him from the said commissioners, from the 4th of December, 1849, until the 27th of May, 1850, that is to say, as to the sum of 35*l.*, parcel of the sum of money in the declaration mentioned, and which in and by the said declaration was claimed by the plaintiff as for wages or salary due and payable by and from the said commissioners, as such, to the plaintiff, for and in respect of his having held and filled the office of street-keeper in and for the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey, under and by virtue of an appointment of him as such street-keeper before then duly made by the said commissioners,—that the plaintiff ought not to have or maintain his aforesaid action against them in respect of the last-mentioned sum of 35*l.*; because they said, that, before the said appointment of the plaintiff to be street-keeper in the said parish, by a certain act of parliament made and passed in the ninth year of the reign of Her present Majesty, intituled, &c., and which hath ever since been, and still is, in full force and effect, the management of all the streets within the said parish, and the foot-pavements thereof (except turnpike-roads, so long *as they should continue [*536 turnpike), were vested in the said commissioners in the declaration mentioned: that, by the said act, it was, amongst other things, enacted, that every person should be liable to a penalty of not more than 40*s.*, who, in any street or public place within the said parish, should place or leave any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or place or use any standing place, stool, bench, stall, or show-board, on any footway: that afterwards, and whilst the said act was in full force, to wit, on the 23d of September, 1845, the plaintiff was appointed street-keeper within the said parish, by the said commissioners, as in the declaration mentioned, and it then became one of the duties of the plaintiff, as such street-keeper, to take care that no person should place or leave any furniture, goods, wares, or merchandise, or other things above mentioned, on any footway within the said parish, and to inform the said commissioners of any person whom he should know to have committed such offence: but that, afterwards, to wit, on the 6th of November, 1849, complaint was made to the said commissioners, that the plaintiff, so far from observing and performing his duty in that behalf, as such street-keeper as aforesaid, theretofore, and whilst the said act was so in force as aforesaid, to wit, on the day and year last aforesaid, allowed and permitted divers persons, to wit, one Thomas Hughes, one Thomas Wadland, and one Benjamin Haydon, respectively, to place divers goods, wares, and merchandise upon certain public footways in the same parish (the same not being turnpike-roads), and to expose the same there for sale, and to leave and continue

the same so exposed, upon the said footways, for a long space of time, to wit, for the space of ten hours; and that the plaintiff then took and received from the said several persons certain gratuities in money for so *537] that behalf: that thereupon the said commissioners appointed a committee of members of their own body, to inquire into the charge so made against the plaintiff, and to report on the same; and that the said committee, after examining the said several persons, in the presence of the plaintiff, then reported to the said commissioners, that, in pursuance of the said reference made to them, they had carefully examined Mr. Wadland, Mr. Haydon, and Mr. Hughes, and caused their statements to be taken down in writing; and that, the several statements having been read over to the complainants (meaning the persons last aforesaid), in the presence of the plaintiff, they severally signed the same, and offered to confirm the same on oath; and that, although the plaintiff entirely denied the statements and charges so made, the said committee then stated they believed the testimony given by the complainants, and so by them offered to be confirmed on oath; and that they were therefore of opinion that the plaintiff had taken and accepted gratuities or rewards from the complainants, with a view of permitting them to continue to expose their goods upon the pavements, so as to cause an obstruction thereof, and in contravention of his duty; and the said committee then further stated, that they were also of opinion that the plaintiff had not impartially or efficiently discharged his duties as street-keeper; and they therefore recommended that he should be suspended from the further performance of his duties, and that the next meeting of the commissioners should be made special for the purpose of revoking his appointment and salary or allowance as superintendent or street-keeper to the said commission: that, upon the said report being heard and read at a meeting of the said commissioners, holden on the 4th of *538] December, in the year last aforesaid, the said commissioners took the same into their consideration, and the same was then by the said commissioners confirmed and adopted; and the plaintiff was then, by the said commissioners, suspended from the further performance of his duties as street-keeper: and that afterwards, to wit, on the day and year last aforesaid, the said commissioners rescinded the appointment of the plaintiff as street-keeper as aforesaid, and removed him wholly from his said office,—of all which the plaintiff then had notice: verification.

To this plea the plaintiff demurred, specially assigning for causes, amongst others,—that it amounted to the general issue;—that, if it did amount to the general issue, it was a plea in confession, without avoidance;—that it did not state that the plaintiff was guilty of the breaches of duty whereof such complaint as in the plea mentioned was made to the commissioners, or that the committee of members therein mentioned were appointed under and by virtue of, and in accordance with, the

statute;—that it did not appear that the meeting of the commissioners at which the report of the committee was confirmed or adopted, or that at which the plaintiff was suspended, or that at which his appointment was rescinded, took place before the causes of action to which the plea was pleaded, accrued to the plaintiff, or that the same, or either of them, were called or held under or by virtue of, or in accordance with, the statute in such case made and provided, or that the same were duly or legally called or held, or that such confirmation and adoption, suspension and rescission, or either of them, were supported or voted for, occurred through, or were authorized by, the requisite numbers and proportions of the said commissioners present at the said meeting respectively;—and that the plea should have shown that the several acts, matters, and things rendered necessary by the said *statute, in [*539 order to enable the said commissioners to effect such confirmation and adoption, suspension and rescission as aforesaid, were performed, done, and existed.

The defendants joined in demurrer.

Lush, in support of the demurrer.—In the first place, the plea in question is bad, as amounting to the general issue. The declaration is upon an executed contract. If the action had been for a wrongful dismissal of the plaintiff from his office, the plea might have been a good one. In the next place, the plea does not show any sufficient ground for the dismissal. The declaration alleges that the plaintiff was duly appointed street-keeper according to the provisions of the act, at a certain salary, and that they refused to pay him. The 42d section of the 8 & 9 Vict. c. clxxvii., enacts that the commissioners shall from time to time appoint a treasurer, clerk, surveyor, collector, and assessor, beadle, street-keeper, and such other officers as they shall think fit, with such salaries and allowances as they think reasonable, and may remove such treasurer, &c., and appoint others in their stead." If the plaintiff took an office under the act, the plea is bad for not showing any good ground for dismissing him from it. It does not allege as a fact that the plaintiff had been guilty of misconduct, but merely that complaint had been made that he had received bribes, and that the commissioners had suspended him. If the plaintiff did not hold an office under the act, the plea is an argumentative denial of the alleged debt. Further, the plea improperly attempts to limit the effect of the declaration. The declaration states that the defendants, as such commissioners as aforesaid, were, on the 17th of July, 1850, indebted to the plaintiff in 500*l.* for wages due from them to him in *respect of his having before [*540 then filled the office of street-keeper. The defendant pleads, as [*540 to so much as is claimed by the plaintiff for wages due to him from the commissioners from the 4th of December, 1849, until the 27th of May, 1850,—that the plaintiff did not during that time hold the office of street-keeper. But there is nothing in the declaration to show that the

plaintiff claims any salary for the period to which the plea addresses itself. [MAULE, J.—How does the declaration show that these defendants are liable? The commissioners are not a corporation.] The 38th section of the act enables any two of the commissioners, or the clerk, to sue and be sued. [CRESSWELL, J.—Are the present commissioners liable for the acts of former commissioners?] The whole scope of the act shows that they are.

Archbold (with whom was *Byles*, Serjt.); contra.—There is no clause in this act of parliament which makes the commissioners liable to an action in respect of this salary. It might be that a *mandamus* would lie against them, to compel them to make a rate: but, at all events, an action will not lie: *Billington v. Smith*, 2 Bingham 156 (E. C. L. R. vol. 9).

JERVIS, C. J.—I am of opinion that the declaration in this case does not disclose a sufficient cause of action to entitle the plaintiff to recover. The declaration states that the defendants were indebted to the plaintiff for wages or salary due to him in respect of his having filled the office of street-keeper under and by virtue of an appointment, at wages or salary before then duly made by the commissioners, under the provisions of the act of parliament. The plaintiff was bound to *541] allege *an appointment under the statute, or he would not be entitled to sue two of the commissioners. I find nothing in the statute to show that such an appointment creates a debt, in respect of which an action can be maintained against the commissioners. It does not, however, follow that the only remedy is by *mandamus*. In *Cane v. Chapman*, 5 Ad. & E. 647 (E. C. L. R. vol. 31), case was held to be maintainable against a clerk to commissioners, there being a public duty which they had neglected to perform. But it is unnecessary to say what the plaintiff's remedy is. It is enough to say that no contract which creates a debt arises from the mere appointment of this plaintiff to the office in question.

MAULE, J.—I also think the declaration in this case bad in substance, as not showing a cause of action. It states that the commissioners for the time being acting under and by virtue of the statute, were indebted to the plaintiff in 500*l.*, for wages or salary due and of right payable by them to him, for and in respect of his having filled the office of street-keeper in and for the parish of St. Mary Magdalen, Bermondsey, under and by virtue of an appointment of him as such street-keeper, at wages or salary, before then duly made by the commissioners, by virtue of and according to the provisions of the statute: so that the ground of the promise is, an appointment of the plaintiff as street-keeper under the provisions of an act of parliament. Now, the provision of the act under which the appointment is made, is to be found in the 42d section, which enacts that the commissioners shall from time to time appoint a treasurer, clerk, &c., street-keeper, and such other officers as they shall think

fit, with such salaries and allowances as they think reasonable, and may *remove such treasurer, &c., and appoint others in their stead. There is nothing said there about their *agreeing* with a street-keeper or other officer, but merely that they shall appoint him, at a salary. When the statute means to speak of contracts, it speaks of them by that name: and all those cases of contracts come before s. 42. I think the true meaning of that section is, not that the commissioners are to *agree*, but that they are to *appoint*; and that, in employing an officer, they simply appoint him, and thereby give him all such rights as are incident to such appointment. It may be,—as in *Cane v. Chapman*,—that a duty in the commissioners to pay the salary, would arise when they have the means of getting the money into their hands. But this is very different from a contract or promise to pay the salary, as alleged here. It may be also that a *mandamus* would lie against the commissioners: but I think it is quite clear that the mere exercise, under s. 42, of a power conferred upon them to appoint an officer, does not amount to a contract to pay the salary; and, unless it does, this declaration discloses no cause of action. I think it would be inconvenient and unjust if the plaintiff could have this remedy, and that the objection is not one of a mere technical description.

CRESWELL, J.—I also think our judgment must be for the defendants. The declaration begins with saying that the defendants are sued as two of the commissioners for the time being appointed, and acting as such, under a certain act of parliament. It then proceeds to state that they, as such commissioners, were indebted to the plaintiff in 500*l.* “for wages or salary then due and of right payable by and from the said commissioners, as such, to the plaintiff, for and in respect of his having before then held and filled, for a *certain long space of time then elapsed, the office of street-keeper, &c., under and by virtue of an appointment of him as such street-keeper, at wages or salary in that behalf (not saying to be paid by the commissioners), before then duly made by the commissioners under and by virtue of, and according to the provisions of, the said act of parliament.” Let us look at the act, and see whether it gives the plaintiff a right of action. It authorizes the commissioners to appoint the officers, and to fix the salary: but it does not say that they shall pay it: on the contrary, it provides that it shall be paid out of the rates. *Cane v. Chapman* is in point.

WILLIAMS, J.—I am of the same opinion. In order to see how the defendants can be charged as two of the commissioners for the time being, it is necessary to refer to the act of parliament: and I think, for the reasons stated by the lord chief justice and my learned brothers, that it is not possible that the commissioners could become indebted in the way alleged in this declaration, viz. by reason of their having appointed the plaintiff to be street-keeper.

Judgment for the defendants.

*544] *DOE d. BLAKISTON and Another v. HASLEWOOD and Another. Jan. 30.

Testator, in contemplation that his death was approaching, devised lands to his wife for life, with remainder in fee to his nephew,—with a condition, that, if his wife should give birth to a posthumous child, such child should take, to the exclusion of the nephew. A child being afterwards born, in the testator's lifetime :—Held, that such child did not take by implication under the will.

THIS was an action of ejectment brought by the direction of the Court of Chancery.

The cause was tried before CRESSWELL, J., at the Durham summer assizes, 1850, when a nonsuit was entered, subject to the opinion of this court upon a special case,—to raise which, a rule nisi was granted to set aside the nonsuit, and enter a verdict for the plaintiff. The facts stated were as follows :

Gilbert Trotter, of Fishburn, in the county of Durham, being, at the time of making his will, and thenceforth to the time of his death, seised in fee of the property in question, made and published a will on the 18th of January, 1787, executed and attested in the manner required by law for passing real estates by devise.

At the time of making his said will, the testator was a married man (his wife's name being Elizabeth); but he had then no child or children. He had not been long married : and evidence was given at the trial, that, at the time of making his will, he was very ill, and thought he was going to die.

The evidence of the facts of the testator being ill, and thinking he was going to die, was objected to on the part of the plaintiff ; and the learned judge received it, subject to the opinion of this court.

After making his will, the testator purchased the lands recited in the codicil, and situate in the township of Frindon, in the county of Durham : *545] and, on the 3d of July, 1799, he made and published a codicil to his said will, duly executed and attested.

Between the date of the will and the date of the codicil, that is to say, on the 1st of June, 1789, the testator's daughter and only child, Elizabeth Trotter (who is mentioned in the codicil), was born. Her mother was the said Elizabeth, who also survived the said testator, and is after mentioned as his widow.

On the 18th of April, 1809, the testator died, without having altered or revoked his said will and codicil, or either of them, save so far as the codicil may have affected the will ; leaving his said widow, and his daughter, and also his nephew, Gilbert Robson, who is mentioned in the will, him surviving.

On the death of the testator in 1809, his said widow Elizabeth entered upon and took possession of the Fishburn estate, and enjoyed it to the time of her death, which occurred on the 31st of July, 1834.

The two female lessors of the plaintiff were the co-heiresses-at-law of the testator's said nephew, Gilbert Robson, who died intestate on the 18th of December, 1845.

The defendants are the devisees in fee of Elizabeth Trotter Thompson, who was daughter and heiress-at-law of the testator's daughter, Elizabeth Trotter. The said Elizabeth Trotter (having married Samuel Thompson) died in 1823; and Elizabeth Trotter Thompson died unmarried in December, 1844.

On the death of her said grandmother in 1834, the said Elizabeth Trotter Thompson entered upon the said Fishburn estate, and enjoyed it till her death.

The will of the 18th of January, 1787, was as follows:

"This is the last will and testament of me, Gilbert Trotter, of Fishburn, in the county of Durham, yeoman, which I make in manner following, that is to say,—I give and devise unto my dear wife Elizabeth Trotter, and her assigns, all that my messuage, house, and premises thereunto belonging, situate, lying, and being in Fishburn [546 aforesaid, and all those my freehold lands, tenements, and hereditaments situate, lying, and being in the township of Fishburn aforesaid, called and known by the name of 'The Fall,' to hold the same to my said wife Elizabeth and her assigns, for and during the term of her natural life; and, subject thereto, I give and devise all and singular my said messuage, house, and premises situate in Fishburn aforesaid, and all those my freehold lands, tenements, and hereditaments situate, lying, and being in the township of Fishburn aforesaid, and all and every other my freehold estate, of what nature soever, or wheresoever, unto my nephew, Gilbert Robson, son of Thomas Robson, of the city of Durham, innkeeper, who intermarried with my sister Margaret,—to hold the same to my said nephew Gilbert Robson, his heirs and assigns for ever. I give and bequeath unto my three nephews, Thomas Robson, William Robson, and John Robson, the sons of the said Thomas Robson, the sum of 30*l.* apiece, which said three respective sums of 30*l.*, 30*l.*, and 30*l.*, so to them by me bequeathed, I will shall be payable and paid from and out of all and singular my said messuage, house, lands, tenements, and hereditaments called 'The Falls,' situate in the town and township of Fishburn aforesaid: and I hereby charge all and singular the same with the payment thereof; but my will is, that the said three several legacies to them so by me bequeathed, shall not be paid to them, nor to either or any of them, or either of their respective issue or issues, until the decease of my wife Elizabeth: But I do hereby declare, that, in case my said wife Elizabeth should, *at my decease*, be pregnant with a child or children, that then and in such case, all and every my devise to my said nephew, Gilbert Robson, of my said messuage and premises, and of my said freehold lands and premises, and my legacies of 30*l.* apiece to my said nephews, Thomas Robson, William Rob- [547

son, and John Robson, shall totally cease, and shall not be raised and paid: And, if it should so happen that the said Elizabeth, my wife, should be brought to bed of any such child or children after my decease, then I give all and singular the same messuage, lands, tenements, and hereditaments so by me heretofore devised, to such one child, if more than one, as shall be a son, the elder of which to be preferred as in seniority of age and priority of birth. I give and bequeath to my said dear wife all my plate, linen, and household furniture, and all other my personal estate, and constitute and appoint my said wife executrix of this my last will and testament, hereby revoking all other wills by me at any time heretofore made, and publish and declare this to be my last will and testament."

The codicil, dated the 3d of July, 1799, was as follows:—

"A codicil to the last will and testament of me, Gilbert Trotter, of Fishburn, in the county of Durham, farmer (which said last will and testament bears date, &c.): Whereas I, the above-named Gilbert Trotter, since the making and publishing my said last will and testament, have purchased two several closes, fields, or parcels of land, being freehold and leasehold property, situate, lying, and being in the township of Frindon, in the county of Durham, of Dr. Reay, of Stockton, in the said county, called and known by the name of 'The Rafters,' and 'The Three-nooked Field,' and now in the tenure and occupation of William Hedley as tenant or farmer thereof; I give, devise, and bequeath all those said two fields, closes, or parcels of ground unto my dear wife, to hold the same to my said dear wife, and her assigns, for and during the term of her natural life, from my death; and, from and after the *548] decease of my said *dear wife, I give, devise, and bequeath the said two fields, closes, or parcels of ground unto my daughter Elizabeth Trotter, her heirs, executors, and administrators, for ever, according to the natures and tenures thereof: But, in case my said daughter Elizabeth shall happen to die in the lifetime of my said dear wife without lawful issue, then and in that case I give and devise the said two fields, closes, or parcels of ground so by me heretofore devised to my said dear wife for her life, to my said dear wife, her executors, and administrators, for ever: But, in case there shall be several issue of the body of my said daughter Elizabeth, both male and female, then and in that case my will and mind is, that the eldest son of the body of my said daughter Elizabeth shall not take any share or beneficial interest in the said two closes or parcels of ground, but I give and devise the same to the other children of the body of my said daughter Elizabeth, lawfully begotten, share and share alike, and to take as tenants in common, and not as joint-tenants."

The question for the opinion of the court, is,—whether, under the above circumstances, the testator's estate called "The Falls," situate at Fishburn, passed by his will and codicil, or either of them, to his

widow, for life, with remainder to his said nephew, Gilbert Robson, in fee.

If the court shall be of opinion that the said estate passed to the testator's widow, for life, with remainder to his said nephew, in fee, then the rule nisi which has been granted to set aside the nonsuit, and to enter a verdict for the plaintiff, is to be made absolute. If the court shall be of a contrary opinion, then the rule is to be discharged.

Manisty (with whom was *Knowles*), for the lessors of the plaintiff.—

1. Upon the construction of the will alone, *Gilbert Robson, the testator's nephew, took a remainder in fee, upon the determination of the life-estate of the testator's widow. The devise to the nephew is in terms plain and free from ambiguity: and the event, the happening of which was to prevent that devise from taking effect, is pointed out in language equally free from obscurity. It is one event, and one only, viz. the *pregnancy* (not pregnancy and birth of a child) of his wife, at the death of the testator, which was to exclude the nephew from the benefit of the previous devise to him. [MAULE, J. "Pregnant with a child or children," may mean, being in such a state as that she might in due time give birth to a child or children. The presence of a mere embryo in the womb of the wife, of which she miscarried, would not probably satisfy the words of the will.] At all events, the testator never could have meant by the words he has used, that the subsequent birth of a child *in his lifetime* should defeat the devise to his nephew. [WILLIAMS, J. He might have known, that, if he survived, and a child should afterwards be born to him in his lifetime, he could revoke or alter his will.] Exactly so. *White v. Barber*, 5 Burr. 2708, which was relied on for the defendants at the trial, is a totally different case from this. There, the testator, having one child living, named Thomas, devised to Eleonor his wife, certain freehold and copyhold property, to hold the same until his son Thomas should attain the age of twenty-one years, in trust that she should educate and maintain him till that time out of the rents and profits of the premises; and then he devised the same to his son Thomas in fee: but, if it should happen that his said wife should be enceinte with one or more children at the time of his decease, and his said son Thomas should die without issue before he attained the age of twenty-one *years, such child or children being then living, he then devised the said premises to his said wife till [*550 such child or children should attain his, her, or their ages of twenty-one years, in trust, nevertheless, that she should educate and maintain such child or children till that time out of the rents and profits of the said premises; and then he devised the same to such child or children in fee: but, if it happened that his said son Thomas should die without leaving issue of his body, and before he attained the age of twenty-one years, or that his said wife should at the time of his the said testator's decease be enceinte with one or more child or children, who should die

without leaving issue of his, her, or their body or bodies, before he, she, or they attained their age or ages of twenty-one years, then he devised the said premises to his said wife, for the term of her natural life; and, from and after her decease, then, as to part of the said copyhold premises, he devised the same to his nephew, in fee. The court held, that the provision in the will for children, comprehended all children, whether born before or after the testator's death: and the lord chancellor (Lord APSLEY) acquiesced in and acted upon that decision.^(a) The certificate given in that case assigns reasons which are somewhat questionable. "We are of opinion," say the court, "that the provision made by the testator being for children which were to be born after the making of his will, he certainly *intended* to comprehend *all* the children which should be born of his then wife (whether *before* or *after* his decease): for, we think that a father, in making an express provision for any children which his wife should be enceinte with at the time of his decease, could never intend to give his estate to such children, in exclusion of, or to his nephews (as the event has happened) in preference to, any child *551] or children that might be born in his lifetime. We are of opinion, therefore, that (notwithstanding the *defect of expression* in this will) the children born before the testator's death are *virtually included* in the provision so anxiously made by a parent for his posthumous children; and that, upon the true construction of this will, the plaintiffs Edward and John^(b) will be entitled (from the testator's *manifest intent*) to take an estate in fee in the premises, at their respective ages of one-and-twenty; and that, in the mean time, the plaintiff Eleanor, their mother, is entitled to hold the said premises, subject to the trust of the said will for their education and maintenance." The court there considered that the language of the will sufficiently indicated an intention on the testator's part to provide for *all* his children, whether born before or after his decease, who should attain twenty-one, before his nephew should take anything under the will. But here, the court cannot, without obscuring the second clause of the will, which is now free from doubt, and making a new one, deprive the nephew of the estate which the first part of the will vests in him. The general principle which governs the courts in the construction of wills, will scarcely be disputed. In *Bootle v. Blundell*, 19 Ves. 494 *b*, 521, Lord ELDON, referring to *Stephenson v. Heathcote*, 1 Eden, 38, observes: "The Lord Keeper (HENLEY) says, that, in the construction of wills, the court is bound to find out the intention of the testator, if it is possible; but then this must be collected from the words, not from circumstances out of the will; and upon general principles and established rules, not by a liberal power of conjecture

(a) 2 Ambler, 701.

(b) As the case states—"infants of tender years, who were born after the making of the will, in the testator's lifetime, and who are still living, and who are not provided for, unless they take by this will."

upon the supposition of *what a man would do in the like circumstances." In *Driver d. Frank v. Frank*, 3 M. & Selw. 25, 48, [*552 LE BLANC, J., says: "Supposing we could be satisfied that it was the intention of the testatrix to keep the two estates separate, and that they should never be united in the same son of B. Frank, of which I cannot satisfy myself, still I can find no words in this will sufficient to carry such intent into effect: for, whatever be the intent, if there are not words in the will to warrant it, express or implied, it cannot have effect." And this passage was adopted by BURROUGH, J., when the same case came before the Exchequer Chamber, on error.(a) In *Boreham v. Bignall*, 14 Jurist, 265, Sir J. WIGRAM, V. C., says: "In considering the construction of the will, I am compelled to consider it, not only with reference to the events which actually happened, but to those which might have happened, and are expressly provided for by the will. To this extent, at least, I must go; and, if the construction which would give the annuity to the widow of James, is incompatible with the construction which such other events require, I must, however satisfied I may be that I am disappointing the real intention of the testator by doing so, hold that the case of James's second marriage is a *casus omissus* from the will, and consequently that the widow of James has no interest in the annuity." Again in *Bird v. Luckie*, 14 Jurist, 1015, KNIGHT BRUCE, V. C., says: "The testator is permitted to be capricious, improvident, and moreover at liberty to conceal the causes and motives by which he has been actuated in his disposition. Many testamentary provisions may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to account satisfactorily: and this *is one among the reasons which may be and have been judicially [*553 given against attributing to men, readily, mistakes in the language that they use in their wills,—against departing from the proper sense of their words, without something more than conjecture, without something more than the opinion of the interpreter, however wise he may be, that the language, construed according to the rules of idiom, would make an eccentric or inconvenient provision; reasons which may not always have been adhered to, which may possibly be at variance with some particular rule of construction, now of settled application, in some particular cases, but which, I apprehend, are generally true and sound."

The first clause of the will, giving a fee to Gilbert Robson, being in itself clear and unambiguous, the second clause, if it be even doubtful, cannot have the effect of cutting down or derogating from that clear and positive devise. The rule is so laid down by Sir E. Sugden, in his treatise on the Law of Real Property, p. 214, and by the still higher authority of the House of Lords, in *Thornhill v. Hall*, 2 Clark & Fin. 22, 36, where the Lord Chancellor (Lord BROUGHAM) says: "I hold it to be a rule that admits of no exception, in the construction of written

(a) 6 Price, 41, 67, 2 J. B. Moore, 519, 524.

instruments, that, where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity—by terms upon which, if they stood alone, no man breathing, be he lawyer, or be he layman, could entertain a doubt; in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should *554] show a possibility; it is not even *sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away, either by *tacitum*, or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*."

2. Upon the second question,—as to which the court pronounced no opinion, the following cases were cited,—*Acherley v. Vernon*, 3 Bro. P. C. 85, 91, *Barnes v. Crowe*, 1 Ves. jun. 486, *Hulme v. Heygate*, 1 Meriv. 285, *Rowley v. Eyton*, 2 Meriv. 128, *Doe d. Murch v. Marchant*, 6 M. & G. 813 (E. C. L. R. vol. 46), 7 Scott, N. R. 644, *Doe d. York v. Walker*, 12 M. & W. 591,† and *Goodtitle d. Woodhouse v. Meredith*, 2 M. & Selw. 5.

Malins, contrà.—1. It appears from the statements in the case, that the testator was newly married, and that, at the time of making his will, he imagined himself to be near his end. Taking the whole will together, it is quite evident that his primary intention was to provide for his wife, and then for his children, if he should have any; and that his nephew was but a secondary object of his bounty. The argument on the other side attributes to the testator an intention to provide for unborn issue, but to prefer his nephew before children who might be born in his lifetime, and who therefore must naturally be expected to be nearer to his affections than those he had never seen,—than which it is difficult to conceive a proposition more monstrous and irrational. If there were an entire absence of authority upon the subject, the court would pause before it came to so improbable a conclusion. The case, however, of *555] *White v. Barber*, which *has never yet been questioned, but which, on the contrary, has always been approved when cited, is expressly in favour of the construction contended for by the defendants; and the court will not now, without good ground, depart from it. It is referred to by all the most approved text-writers,—in *Jarman on Wills*, vol. I., p. 475, and in *Fearne on Contingent Remainders*, 10th edit., vol. I., p. 513; and it is also relied on by COLERIDGE, J., in the judgment in *Morrall v. Sutton*, 1 Phillippa, 533, 551. Speaking of that case, that learned judge says: "The court thought that a father who took such anxious care for posthumous children as to make an express provision for them, could never intend to give them an estate in exclusion of, or to his

nephews in preference to, any child or children that might be born in his lifetime. They, therefore, not only supplied a devise, but framed it in a special manner to meet the supposed intent, which they gathered from the will, upon moral evidence, highly probable, but falling very far short of demonstration." [WILLIAMS, J.—It was about the time that *White v. Barber* was decided, that the courts first held that marriage and the birth of a child operated a revocation of a will. Suppose at the time of the death of the testator there was one child born, and another *in ventre sa mere*, which would take? Surely the latter might say that he was the person mentioned by the testator. Would he take in exclusion of the elder child?] It is submitted that he would not. In *Jaggard v. Jaggard*, Prec. Chan. 177, cited in 2 Williams on Executors, 941–2, it was held, that, if a father gives a legacy to provide for a child *in ventre sa mere*, by the term of a "posthumous child," and he happen to survive its birth, it will still be considered a posthumous child within the meaning of the will." [WILLIAMS, J.—Was the wife in *that case pregnant at the date of the will?] Yes; but that circumstance is not relied on. [WILLIAMS, J.—It was mere *falsa demonstratio* there; the legatee was ascertained.] This is somewhat analogous to the cases where provision is made for the happening of an event in one manner, and it happens in another: *Jones v. Westcombe*, 1 Eq. Abr. 245; *Gulliver v. Wickett*, 1 Wils. 105. The testator evidently intended to provide for any future issue he might have; and that the devise to the nephew should be defeated by pregnancy and the birth of a child. *White v. Barber* is not distinguishable from the present case, and any departure from the principle there laid down, will defeat the manifest intention of the testator. [MAULE, J.—We must construe the will agreeably to the intention of the testator, as that intention is apparent upon the face of the will.] But the court will not, by adhering literally to the words, defeat the testator's evident intention.

Manisty, in reply, was stopped by the court.

JERVIS, C. J.—I am of opinion that the testator's widow took under the will an estate for life, and the nephew, Gilbert Robson, the remainder in fee. There seems to be no dispute as to the principle which ought to govern this case; the only difficulty is as to its application. There is a positive devise, in the first instance, to the wife for life, and a devise over to the nephew in fee; and we must construe the will so as to defeat that plain direction, if we decide in favour of the defendants. At the time of making his will, the testator contemplated that his death was approaching; and that circumstance is not to be lost sight of. It is said that he contemplated, not only the possibility of his wife giving birth to a child after his death, of which she might be pregnant at the *time that event took place, but also the possibility of her having a child or children during his lifetime. But, why are we driven [*557 to infer an intention different from that which appears at the time to

have been present to the testator's mind? Having disposed of the property in question in the way I have mentioned, the testator goes on to say—"But I do hereby declare, that, in case my said wife Elizabeth should, *at my decease*, be pregnant with a child or children, that then, and in such case, all and every my devise to my said nephew, Gilbert Robson, of my said messuage and premises, &c., shall totally cease; and if it should so happen that the said Elizabeth, my wife, should be brought to bed of any such child or children after my decease, then I give all and singular the same messuage, &c., so by me heretofore devised, to such one child, if more than one, as shall be a son, the elder of which to be preferred as in seniority of age and priority of birth." Why is it necessary for us to infer that the testator intended to provide for children who might afterwards be born in his lifetime, when he had the power at any time to alter or revoke his will? It seems to me that the very foundation of the rule upon which the defendants rely is wanting here; and that, when we take into consideration the time at which the will was made, there is no necessity and no warrant for inferring an intention which is not apparent upon the face of it. I cannot help seeing that this decision may be said to detract from the authority of *White v. Barber*; but, if it be necessary to do so, I am quite prepared to say, that, in my opinion, *White v. Barber* was not correctly decided. If I am right in the construction which I put upon the will, it is not necessary to consider the effect of the codicil; for, if the will excludes children born in the testator's lifetime, it is not suggested that its effect is at all enlarged by the terms of the codicil. I am therefore of opinion that the lessors of the plaintiff are entitled to judgment.

*558] *MAULE, J.*—I also am of opinion that the testator's nephew, Gilbert Robson, took under the will a remainder in fee. I cannot disguise from myself that this decision is opposed to *White v. Barber*. I understand that case in the view presented by Mr. *Jarman*, and also by my brother *COLERIDGE*, in *Morrall v. Sutton*, viz., that the court inferred, from the relation in which the claimants stood to the testator, that it was in the highest degree improbable that he did not by his will intend to provide for one of the classes which would naturally stand nearer to his affections than one which was undoubtedly intended in some event to be provided for. I do not think that is a sound principle. However obvious may be the intention of a testator, unless you can find in the will apt words to carry out that intention, I do not think the court can properly act upon the supposition that such intention existed. And I think that the court, in *White v. Barber*, acting upon a presumed intention of the testator, did not put a construction upon the words which he had used, but interpolated a clause for the purpose of executing that intention. The circumstance of a man showing, by a recital, for instance, that he intends to provide for all his children, cannot be carried into effect, unless there are apt words in the will to carry out such in-

tention; the answer often given in such cases is, *quod voluit non dixit*. *White v. Barber* is clearly distinguishable from the present case; but, as it evidently proceeded upon erroneous principles, I do not think it necessary to distinguish it. It is said that this testator, at the time he made the will, contemplated immediate death, or, at all events, that he must die very shortly. If he had made his will contingent upon that event, nobody could have doubted that the words he has used would be applicable only to a posthumous child. If we are to depart from the grammatical construction of the will, I think it would be doing less violence to its language, if *we say that it was to take effect only [559 in the event of the testator's dying immediately. It is evident that the instrument is one which he expected would be called into operation only in the event of his dying at such a period that he could only leave a posthumous child. The circumstances under which the will was made, so far from showing an intention in the testator to provide for *all* his children, plainly negative such intention; they show no intention to provide for any but a posthumous child. It is not by any means an improbable thing, that, if the testator's attention had been called to the legal effect of the provision he was making, he would have said that he meant to make a new will if he should have a child born in his lifetime. All we have to do is, to construe the will as we find it; it in plain terms gives the estate to the nephew, and there is nothing in the subsequent words to take it from him. I conceive it to be very clear that, in thus deciding in favour of the nephew, we do not provide for the testator's family precisely as he himself would in all probability have done; but I think we do give to the only instrument which we have to deal with, the only operation the testator intended that instrument to have.

CRESSWELL, J.—When this case was before me at *nisi prius*, *White v. Barber* was relied on for the defendant; I then thought, and I still think, that it is an authority in point. At *nisi prius*, I felt myself bound to act upon it; but sitting here *in banco* I do not. I think it cannot be supported. There, the object of that part of the will which was in question, was, to give an estate; here, the effect is to take away an estate previously given; but, in truth, the same question arises in both,—what was the intention of the testator? and are the words he has used sufficient to accomplish that intention? In order to sustain this nonsuit, it must be made out that the testator *intended to [560 give to a child who might be born in his lifetime, an estate which he had already given to his nephew. I do not think he intended by this instrument to take away from his nephew the estate which he had given to him. I see no reason for supposing that he did not intend to make the will he has made, or that it should have any other effect than that which we now give it. There is nothing to show that the testator had the intention insisted upon by the defendants; and, if there was, I do not agree that we could hold the words to be sufficient for the pur-

pose. Upon these grounds, I think the verdict ought to be entered for the lessors of the plaintiff.

WILLIAMS, J.—I am of the same opinion. The will contains a clear and unambiguous devise to the testator's nephew, subject to the previous estate for life given to the widow. The testator contemplates only one event which was to nullify the devise to his nephew; and that event has not happened; consequently, the nephew takes the estate. It is said that the testator could not have intended anything so monstrous, as that a child who might happen not to be posthumous should be disinherited, in favour of a nephew. Perhaps not. In all probability, the happening of such an event never occurred to him. Or, possibly, he intended to alter his will if he survived. I think we must adhere to the principle which has so long prevailed in the construction of wills, of collecting the intention of the testator from the language he has used; and, if we can only adhere to that principle by overruling the case of *White v. Barber*, I, for one, am quite prepared to do so.

Verdict for the lessors of the plaintiff.

*561] *PRICE and Another v. MOULTON. Jan. 16.

A bond or covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a merger of the remedy on the simple contract.

To an indebitatus count for 6000*l.*, the defendant, as to 3000*l.*, parcel, &c., pleaded, that, after the accruing of the cause of action as to the 3000*l.*, parcel, &c., it was agreed that the defendant should execute an indenture whereby he should covenant with the plaintiffs to pay them 3000*l.* and interest on a certain day; that, in pursuance of that agreement, the defendant did, with the assent and consent, and at the request of the plaintiffs, execute and deliver to them such indenture as aforesaid; and that thereupon, and by force of the said indenture, the cause of action as to the 3000*l.*, parcel, &c., became merged and extinguished in law.

Replication, that the indenture was made by way of security, for securing the payment of the said debt of 3000*l.* in the plea mentioned, and that it always was and is in and by the said indenture expressed that the same was made as such security as aforesaid:—

Held, on demurrer, that the plea amounted to a plea of merger, and was a substantial answer to the count, though it contained no allegation that the indenture was accepted by the plaintiffs in satisfaction of the original debt; and that the replication afforded no answer to the plea.

DEBT. The first count of the declaration stated, that, theretofore, to wit, on the 20th of June, 1850, by a certain deed then made between the defendant of the one part, and the plaintiffs of the other part,—one part, &c., profert,—after reciting, amongst other things, that the plaintiffs had agreed with the defendant to act as his agents in the city of London, for the term of seven years, in the vending of the various articles and goods manufactured by him, called rubber goods; and, in pursuance of such agreement, and in consideration of the covenants and agreements thereafter entered into by the defendant, they had agreed to advance to the defendant to the extent of 5000*l.*, for the purpose of being laid out and expended in the manufacturing and production of the said goods, and that the same goods, as the same should be

produced, were to be consigned to the plaintiffs for sale, and were to be held by the plaintiffs as a security for repayment of the said sum of 5000*l.* and interest at 5*l.* per cent. per annum, and that the proceeds of the sales *thereof were, in the first place, to be supplied by the plaintiffs in repayment of the said sum of 5000*l.* and interest,— [*562 and after further reciting that the plaintiffs had already advanced to the defendant 4700*l.*, in part of the said sum of 5000*l.*, amongst other things, they, the plaintiffs, did by the said indenture covenant and agree with the defendant, his executors, administrators, and assigns, that they, the plaintiffs, should and would conduct and carry on the said agency, at, &c., in the city of London, and should and would carefully deposit and preserve in the warehouse for the time being made use of for the purpose of the said agency business, all such goods, wares, and merchandise as might be sent or transmitted to them by the defendant, or any person or persons who might be partner or partners in trade with him, or the survivor or survivors of them, and that, in managing or conducting the said agency, they the plaintiffs should and would use their best endeavours to produce the greatest possible sale of the said articles and goods which they should be employed to sell as such agents as aforesaid; and also that the plaintiffs should and would, from time to time, in the beginning of each and every month, send and transmit to the defendant a full, clear, and correct account and statement in writing of all sales, and also of all goods which might come to their hands, and likewise of all such other matters, transactions, and things as in anywise should concern the said agency business, and which might have taken place during the preceding month; and also should and would pay over to the defendant the full amount of the goods they might appear to have sold, whether for cash or on credit, on being allowed a discount of two and a half per cent.; and also that the plaintiffs should and would, so long as the said agency business should continue, find and provide a warehouse for the purpose of *carrying on the said business, and should and would bear, pay, and sustain all necessary and incidental expenses attending the carrying on the same: and the defendant, for the consideration aforesaid, for himself, his heirs, &c., did thereby covenant and agree with the plaintiffs, that he, the defendant, should and would employ the plaintiffs as his agents in the vending of the articles and goods manufactured by him, for the term of seven years, and that he the defendant should not nor would employ any other person as agent, during such time as the plaintiffs or the survivor of them should act as such agents as aforesaid,—it being by the said agreement expressly agreed that the plaintiffs should be the sole agents for the sale of the said goods, and that the whole of the said articles and goods manufactured by the defendant were to be sold through the plaintiffs, and entered in and passed through their books, whether the same should be actually sold by them or by the defendant: and it was thereby

agreed, that, in case of the non-performance of the said covenants and agreements therein contained on the part of the defendant to be performed and kept as aforesaid, he the defendant should and would well and truly pay unto the plaintiffs, or the survivor of them, the sum of 3000*l.* of lawful money, &c., by way of liquidated damages for the non-performance of the said covenants, and not by way of penalty. The count then proceeded to allege performance by the plaintiffs, and a breach by the defendant, in the employment of other agents, and the sale of goods to other persons without giving the plaintiffs information thereof so as to enable them to make entries thereof, and non-payment of the 3000*l.* stipulated damages.

The second count claimed 6000*l.* for money paid, money had and received, interest, and money found due upon an account stated.

*564] Plea,—as to the sum of 3000*l.*, parcels of the moneys *in the last count of the declaration mentioned, and the causes of action in respect thereof,—that theretofore, and after the accruing of the cause of action as to the said sum of 3000*l.*, parcel, &c., and before the commencement of this suit, to wit, on the 20th of June, 1850, it was agreed between the plaintiffs and the defendant, that the defendant should sign, seal, and as his act and deed deliver to the plaintiffs a certain indenture, between the defendant of the one part, and the plaintiffs of the other part, and thereby, amongst other things, covenant and agree with the plaintiffs, their executors, &c., that he, the defendant, his executors or administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the plaintiffs or their assigns, or the survivor of them, or the executors, administrators, or assigns of such survivor, the said sum of 3000*l.* in the introductory part of this plea mentioned, at, &c., on the 21st of December, 1851, with interest for the same after the rate of 5*l.* for every 100*l.* for a year, to be computed from the day and year first aforesaid, without making any deduction or abatement for or by reason of any then present or future taxes, assessments, rates, or impositions, or other cause, matter, or thing whatsoever, the tax on property or income payable in respect thereof, only excepted: That, in pursuance of such agreement, and in performance of his part thereof, the defendant did afterwards, and before the commencement of this suit, and whilst the said sum of 3000*l.* was still due and unpaid as aforesaid, to wit, on the day and year last aforesaid, with the assent and consent, and at the request of the plaintiffs, sign, seal, and as his act and deed deliver to the plaintiffs such indenture as aforesaid (and which said indenture of mortgage,^(a) sealed with the seal of the defendant, being in the custody of the plaintiffs, the defendant cannot bring here into court), and did thereby covenant to pay the said sum of 3000*l.* in *565] the *introductory part of this plea mentioned, with interest thereon after the rate aforesaid, upon and at the day and time, and in the manner agreed upon as aforesaid, according to the true intent

and meaning of the said agreement,—as by the said indenture appears: And that thereupon, and by virtue and effect of the said indenture, the said cause of action in the said last count mentioned, so far as the same related to the said sum of 3000*l.*, parcel, &c., became and was wholly merged and extinguished in law,—verification.

Replication, that the said indenture in the last plea mentioned was made by way of security, for securing the payment of the said debt of 3000*l.* in the introductory part of the said last plea mentioned; and that it always was, and is, in and by the said indenture expressed, that the said indenture was made as such security as aforesaid,—proof of the indenture, and verification.

Special demurrer, assigning for causes,—that the replication neither traverses nor confesses and avoids the plea,—that, if it is a traverse thereof, it is wrongly concluded, and should have concluded to the contrary,—that it seeks to vary the effect of the deed, by parol,—that it states the effect, or supposed effect of the deed, without setting forth the same, either on oyer, or by enrolling it, or praying its enrolment,—that it raises a question of law for the jury,—that no issue in fact can be taken thereon,—that it is not sufficient to say that the said indenture was made as a security for securing payment of the said sum of 3000*l.*, but that the replication should have stated and shown that the original debt was to remain, and not be merged and extinguished, and how it was to remain and not be merged and extinguished,—that the replication is an argumentative traverse of the agreement stated in the last plea,—that it is not directly alleged there was an agreement that the deed should be such security as alleged,—that the expression “made by way of security,” is *vague, ambiguous, and of uncertain legal meaning,—and that [*566 it is not shown that the same was sealed, delivered, or executed with such intent as alleged, nor accepted by the plaintiffs with such intent as alleged.

The plaintiffs joined in demurrer.

Willes, in support of the demurrer.(a)—The plea is good, and the replication no answer to it. The plea states, that, after the accruing of the cause of action as to 3000*l.*, parcel, &c., it was agreed between the plaintiffs and the defendant, that the defendant should execute and deliver to the plaintiffs a certain indenture, and thereby covenant and agree with the plaintiffs to pay them the 3000*l.* on a certain day; that in pursuance of that agreement, the defendant afterwards, and whilst the 3000*l.* was still due and unpaid, to wit, on, &c., with the assent and consent, and at the request, of the plaintiffs, did execute and deliver to the plaintiffs such indenture, and did thereby covenant to pay the 3000*l.*,

(a) Points for argument on the part of the defendant,—“That the replication is either an argumentative denial that the deed in the plea is such a deed as alleged, or it is an indirect averment that there was an agreement which would prevent the merger of the simple contract in the specialty debt; and that the replication should have denied the agreement alleged in the plea, or set forth the deed, and shown by the indenture itself that there was no merger.”

with interest, upon the day named; and that thereupon, and by virtue of the said indenture, the cause of action as to the 3000*l.*, parcel, &c., became and was merged and extinguished in law. To this the plaintiff replies, that the indenture in the plea mentioned was made by way of security, for securing the payment of the said debt of 3000*l.* in the introductory part of the plea mentioned. That clearly is no answer. Suppose the covenant *was* given as a security, it gives the plaintiffs a higher remedy, in which the remedy on the simple contract is merged.

*567] In Com. *Dig. *Action upon the Case upon Assumpsit* (H. 8), it is said: "To an assumpsit, the defendant may plead in discharge a bond given for the debt." [JERVIS, C. J.—Whether the indenture was given as a security for the debt only, or as satisfaction, the debt is covered by the higher security.]

Dowdeswell, contra. (a)—It does not inevitably follow that the simple contract debt is merged, because the debt has been secured by a bond or covenant; it is purely a question of intention. In *Twopenny v. Young*, 3 B. & C. 208 (E. C. L. R. vol. 10), 5 D. & R. 259 (E. C. L. R. vol. 16), A. being indebted to C., A. and B. gave their joint and several promissory *568] note for the amount to C. A., *becoming further indebted, and pressed for further security, by a bill of sale (reciting that C., having demanded payment of the debt, A. had requested him to accept a *further* security), assigned his household effects to C. as a *further* security, with a proviso that he should not be turned out of possession of the effects till after three days' notice; and it was held that C.'s remedy on the note was neither suspended nor extinguished by the bill of sale, but that he might sue A. on the note at any time, notwithstanding the bill of sale. *Allenby v. Denton*, 5 Law Journ. K. B. 312, *Yates v. Aston*, 4 Q. B. 182 (E. C. L. R. vol. 45), 3 Gale & D. 351, and *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), show that the plaintiffs were not bound to resort to their remedy on the covenant. [JERVIS, C. J.—There was no covenant to pay either in *Allenby v. Denton* or *Yates v. Aston*.

(a) Points for argument on the part of the plaintiffs:—"The plaintiffs will contend that the replication sufficiently confesses and avoids the plea, by adding the fact that it was not given in lieu or substitution for the simple contract debt, so as to create a merger, but simply as a security for it, as a still subsisting obligation; and that the proper course was, for the defendant to craveoyer, and set out the deed, and demur if it did not bear the construction put upon it by the plaintiffs. They will also contend, that, if the replication is bad, the plea is bad, since it does not allege any agreement or intention that the original debt was to be extinguished or merged, or that it was not to subsist as a legal claim, or that the deed was to be taken in accord and satisfaction of the debt: also that the plea does not state or show that the plaintiffs ever accepted the deed: and also that it is quite consistent with the supposition that the covenant was to be a further or merely collateral security: and also that the plea is pleaded to the debt and causes of action in respect thereof, which includes interest or damages for the detention of the debt, which had accrued in the interval; yet it only shows an answer to the original sum of 3000*l.*: and that the plea does not show that the remedies afforded by the covenant were co-extensive with the remedies and rights in respect of the original debt: and that the plea is also bad, for not setting forth the deed, and leaving the construction thereof for the court: and that the plaintiffs could take no issue in fact upon it, inasmuch as it would have been submitting a mere question of law, viz., the operation and effect of a deed, to the jury."

MAULE, J.—BAYLEY, J., says, in *Twopenny v. Young*,—"Generally, a simple contract security is extinguished by a specialty security, if the latter gives a remedy co-extensive with that given by the former." The plea does not state that the deed was given for and on account of, or that it was accepted in satisfaction of, the original debt. [MAULE, J.—The plea is certainly a little suspicious, in respect of the novelty of its form. If it is good for anything, it is a plea of merger.] In *Holmes v. Bell*, 3 M. & G. 213 (E. C. L. R. vol. 42), 3 Scott, N. R. 479, the defendant opened an account with a banking company in July, 1834; and in October, in the same year, together with a surety, signed and delivered to the managing directors of the company a bond reciting that certain title-deeds had been deposited with the company, and conditioned for the payment by the obligors to the company, at the expiration of a three calendar months' notice, of all such sums of money not exceeding 5000*l.* as should at the time of the demand be due and owing *to the company in respect of advances already made or there- [*569 after to be made by the company for or on account of the defendant, together with interest, &c. : and it was held that the company were not precluded by this bond from suing the defendant in assumpsit. [MAULE, J.—The deed here is a security for an existing debt. It is a merger, if there be such a thing *in rerum natura*. If the judgment be against you upon this record, and you afterwards brought covenant or debt upon the deed, would you or would you not be barred by the judgment?] The plea does not show that the indenture was given for the debt, or accepted in satisfaction, as it should have done, to constitute a good plea: *Paine v. Masters*, 1 Stra. 573; *Crisp v. Griffiths*, 2 C. M. & R. 159.† The deed clearly was not intended to operate a merger, and consequently the right of action upon the simple contract still remains. In the *Norfolk Railway Company v. M'Namara*, 3 Exch. 628,† the defendant, being indebted to the plaintiffs on simple contract, executed, with sureties, a bond in the penal sum of 2000*l.*, whereby, after reciting that the plaintiffs had agreed to give the defendant time for the payment of the debt then owing, and of such further sums as might afterwards become due, the condition was, that, if the defendant should pay the plaintiffs the sum then due, and such further sums as might become due, or in case the defendant should make default, and the sureties should, within one month after notice, pay the plaintiffs the sums due, not exceeding 1000*l.*; or, if no notice should be given, the bond to be void: it was held that this was no merger, and that the plaintiffs might, notwithstanding the giving of such bond, recover the amount of the original debt, in an indebitatus count for the carriage of goods. That case is precisely in point.

* *Willes*, in reply.—The simple contract debt is merged in the specialty, by operation of law. In Com. Dig. *Pleader* (2 G. 12), [*570 it is laid down, that, "to an assumpsit, the defendant may plead a bond

given by him for the money demanded; for, the bond determines the contract." For this Comyns cites two precedents,^(a) and also the cases of *Ellis v. Warnes*, Cro. Jac. 33, *Dalby v. Cooke*, Cro. Jac. 234, and *Acton v. Symons*, Cro. Car. 415.^(b) [CRESSWELL, J.—Can you merge part of a debt? Suppose a debt of 5000*l.*, and there be a merger as to 1000*l.*, can it be said that the remedy for the original debt is entirely gone?] This plea does not raise that question: and, if it did, it should have been answered by the replication. [JERVIS, C. J.—In *Higgen's* case, 6 Co. Rep. 44 b, it was objected, "that, if a man recovers debt on a bond, or rent on a lease for years, it is at the plaintiff's election to sue execution on that judgment, or to have a new action; and that for divers reasons,"—amongst others—"4. If two be bound in a bond jointly and severally, and the obligee recovers against one of them on this bond, the nature of the bond is not so changed by this recovery but he may on the same bond have an action against the other. But it was resolved, that, as long as the judgment remains in force, he cannot have a new action on the same bond; for, as he who has a debt by simple contract, and takes a bond for the same debt, or any part of it, the contract is determined."^(c) So, when a man has a debt on a bond, and, by ordinary course of law, has judgment thereon, the contract by specialty, which is of an inferior nature, is, by judgment of law, changed into a matter of record, which is of a higher nature."'] Where an action *571] is brought for a simple contract debt, and the plaintiff obtains judgment for a smaller sum, the debt merges in the judgment. [CRESSWELL, J.—Is not that on the ground that the judgment is conclusive evidence of the amount of the debt? WILLIAMS, J.—Would this deed operate as a merger, if it had been expressly stipulated that it should be a collateral security only?] In that case, probably, the covenant should be construed to be a covenant to pay another sum of money. [CRESSWELL, J., to *Dowdeswell*.—What is there to prevent the plaintiffs from suing upon the deed, if they get judgment here? *Dowdeswell*.—Equity would restrain them. CRESSWELL, J.—We do not know what equity might do. MAULE, J.—Could it have been the intention of the parties, that the defendant should be sued on the simple contract immediately after executing the deed? *Dowdeswell*.—The defendant would be placed in no difficulty: if he pays the 3000*l.*, he may plead it.] *Crisp v. Griffiths* has not been altogether approved of.

JERVIS, C. J.—The unusual form of the plea in this case created some doubt in my mind during the argument: but, upon the best consideration I can give to the matter, it appears to me that the plea is good as to so much of the cause of action as it is pleaded to, and that the replication is no answer to it, and consequently that the defendant is entitled to judgment. The plea is pleaded as to 3000*l.*, parcel of the

(a) Cl. Ass. 117; Clift, 199.

(b) And see Com. Dig. *Pleader* (2 W. 46).

(c) 3 H. 4, 17 b; 11 H. 4, 79 b; 9 E. 4, 50 b, 51 a.

money in the last count. If the plaintiffs had meant to object that the plea seeks to merge a larger debt in a smaller, that objection is met by the answer given by the defendant's counsel, viz., that that should have been replied. The plea states, that the defendant, before the commencement of the suit, and whilst the sum in the introductory part of the plea mentioned was still due and unpaid, with the *assent and consent, and at the request, of the plaintiffs, signed, sealed, and [*572 delivered to the plaintiffs a certain indenture whereby he covenanted and agreed to pay to the plaintiffs or their assigns, &c., the said sum of 3000*l.* and interest, on the 21st of December, 1851, and that, by the legal effect of that deed, the cause of action in the last count mentioned, so far as the same related to the 3000*l.*, parcel, &c., became merged and extinguished. The replication merely states that the indenture in the plea mentioned was made by way of security for the payment of the said debt of 3000*l.* in the introductory part of the plea mentioned. *Primâ facie*, the general rule is, that, where a security of a higher nature is taken for the same debt, it operates a merger of the lower security: a party cannot sue for money had and received, where he has got a security for the same debt, which gives him a remedy of a higher degree. If there be anything to take this case out of that general rule, it lies upon the plaintiffs to show it. It is said, that the security is not for the same debt or cause of action; but I think it is, to the extent of 3000*l.* Some cases have been referred to which seem at first sight to create a difficulty. In *Holmes v. Bell*, 3 M. & G. 213 (E. C. L. R. vol. 42), 3 Scott, N. R. 479, where a banker took from a customer and his surety a bond conditioned for the payment of all moneys advanced or to be advanced, it was held that there was no merger. But, upon examination of that case, it will be found that the actual debt was not in existence at the time of the giving of the bond; and consequently there could be no merger or extinguishment. The same answer may, I think, be given to *The Norfolk Railway Company v. M'Namara*, 3 Exch. 628:† there, the bond was given to secure money already due, as well as money to become due: and PARKE, B., says, "It is evident, therefore, that *the bond must have been meant only as a collateral security;" but he adds, "If this had been the [*573 case of a bond or covenant for the identical debt, the plea would have been a good answer." Here, there is a covenant for the identical debt, and therefore I think the case comes within the *dictum* of PARKE, B., and that this is a good plea. The defendant, therefore, is entitled to judgment.

MAULE, J.—I am of the same opinion. I think this replication, in stating that the deed was executed as a security for the payment of the debt, does no more than state that it was executed for the purpose of giving to the plaintiffs an effectual remedy for the payment of the debt,—which belongs to every covenant given for the payment of the debt

itself. A covenant to pay a debt is a security for its payment. Here, a debt of 3000*l.* was due from the defendant to the plaintiffs, and the defendant gives them a covenant to secure the 3000*l.* It does not merge or extinguish the debt; but it merges the remedy by way of proceeding upon the simple contract. The replication merely states that the indenture in the plea mentioned was made by way of security, for securing the payment of the debt of 3000*l.* in the introductory part of the plea mentioned. That clearly amounts to no answer to the plea. Upon the authorities, and the general understanding of the profession, I think it is quite clear that a man cannot have a remedy by covenant and by assumpsit for the same debt; the two are wholly incompatible and cannot co-exist. If the promise was made before the covenant, the latter must prevail. The intention of the parties has nothing to do with that. I entirely agree with the *dictum* of PARKE, B., in the case of *The Norfolk Railway Company v. M'Namara*, where he says: "If the bond or covenant had been for the identical debt, the plea would *574] have been *a good answer, without the additional allegation that the instrument was given in satisfaction." The policy of the law is, that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand. I therefore think that this plea, though certainly a remarkable one, does contain a substantial answer to that part of the demand to which it is pleaded, and entitles the defendant to our judgment.

CRESWELL, J.—I am of the same opinion. The unusual form of the plea induced me to suspect that it was intended to conceal the real defence. As far as we can collect the intention of the deed, it must, I think, be taken to have been that which is its legal operation and effect, viz. to alter the simple contract debt into a specialty debt. We have been reminded that a debt due for rent is not merged by the giving of a bond. But rent is a specialty debt. I therefore think the plea substantially a good one; and that the replication,—which is intended to deny that the deed operated a merger,—is no answer to the plea. I think the deed *must* so operate, irrespectively of any intention of the parties.

WILLIAMS, J.—I am of the same opinion. I think it sufficiently appears on this plea, at all events on general demurrer, that, by agreement between these parties, a new obligation of a higher nature was created, by which the simple contract debt was merged. A little doubt was engendered by the cases of *Holmes v. Bell* and *The Norfolk Railway Company v. M'Namara*, where some expressions are used which seem to import that such a covenant might have a more limited operation. But it appears to me, that, where such an obligation as is described *575] in this plea has been entered into, the inevitable consequence is, that the simple contract debt is merged *in the higher security.

The plea is good enough, and the replication bad; and the defendant must have judgment. Judgment for the defendant.

A lesser security is extinguished by a higher security taken for the same debt, and merges in it as a general rule. *Van Vliet v. Jones*, 1 Spence, 340. *Gardiner v. Hust*, 2 Richardson, 601. The question however is one of intention, and if it appear, either upon the face of the security or by other evidence, that the higher security was taken only as a further or collateral security, there is no merger. *Ibid.* *The Betsy & Rhoda, Davies*, 112.

A parol contract is merged in a higher security for the same thing. *Vaughn v. Lynn*, 9 Missouri, 770. A specialty executed by one partner, for the payment of a partnership debt, although binding on him alone, is an extinguishment of the partnership debt. *Tom v. Goodrich*, 2 Johns. 213; *Settle v. Davidson*, 7 Missouri, 604. The acceptance of the bond of an executor by a legatee for the amount of his legacy is an extinguishment of it. *Stewart's Appeal*, 3 Watts & Serg. 476. A merger takes place only where the debt is one, and the parties to the securities identical, which works a dissolution not of the debt but of the original security. *Jones v. Johnson*, 3 Watts & Serg. 276. Per *Grisson, C. J.*: "There is a substantial distinction which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, though depending on different principles, have usually been confounded; and hence a perceptible want of precision in the language of those who have written or spoken of them. In the first of them, the original security is extinguished but the debt remains: in the second, the debt, as well as the security, is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and being by act of law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently between securities of the same degree or of different degrees; and being by act of the parties, it is the creature of their will. No expression of inten-

tion would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing in *rem judicatam*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for to allow a debt to be at the same time of different degrees and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions and the distribution of assets. But as the existence of a promissory note as a concurrent security for a book debt produces no such consequences, it operates no extinguishment by act of law; and it depends on the assent of the parties, tacit or explicit, whether the new evidence of the debt is accepted in discharge of the old one." *Ibid.*

An agreement under seal is not a merger of a simple contract debt, if accepted as collateral security. *Charles v. Scott*, 1 Serg. & Rawle, 294. A written instrument, merely recognising a debt, providing the manner of its liquidation, and adjusting the balance, is no merger. *Smith v. Morrison*, 3 A. K. Marshall, 81. If the maker of an endorsed promissory note secure it by a mortgage of the same date, the note is not merged in the mortgage, nor is the endorser discharged thereby. *Liggett v. Bank of Pennsylvania*, 7 Serg. & Rawle, 218. The execution of a sealed note for a debt due by partners by one of them, in the firm name without authority, does not merge the joint liability on the simple contract. *Brozee v. Poynts*, 3 B. Monroe, 178; *Calk v. Orear*, 2 *Ibid.* 420; *Horton v. Child*, 4 Devereux, 460. The taking of a note for a debt is not a merger of it, unless it is so specially agreed; and whether there was such a special agreement is a question of fact for the jury. *Steamboat Charlotte v. Hammond*, 9 Missouri, 59. A warrant of attorney to confess a judgment upon a debt due directly from the defendant to the plaintiff, is not a collateral security merging the original debt. *Sloc v. Lea*, 18 Ohio, 279.

CAUDWELL v. COLTON, Clerk. Jan. 16.

In this court, a writ of sequestration issues without motion.

C. JONES, Serjt., moved for a writ of sequestration to be awarded to the Bishop of Chichester, to sequester the ecclesiastical profits of the defendant's living in Essex. He referred to *Rex v. Hind*, Clerk, 1 Dowl. P. C. 286, 1 C. & J. 389,† 1 Tyrwh. 347, and *Rex v. Armstrong*, Clerk, 3 Dowl. P. C. 760, 2 C. M. & R. 205,† 5 Tyrwh. 752.(a)

JERVIS, C. J. (after conferring with Mr. *Tootell*).—The officer informs us that the practice here is, for the party to issue the sequestration, without the authority of the court. This being so, we will not create a new practice, for the mere purpose of creating additional costs.

Jones took nothing.(b)

(a) And see *Rex v. Powell*, 1 M. & W. 321.†

(b) The motion was after a *special capias ulagatum*; in which case, the proceeding should be in the Exchequer. See *Lush's Practice*, 682.

*576] *ADDINGTON and Others v. MAGAN. Jan. 21:

A plea of set-off to a count in debt for goods sold and delivered, stated that the plaintiffs authorized and empowered one A. to trade under the firm of "A. & Co.," and, so trading, to sell the goods in question to the defendant *as and for his own proper goods*, and that the defendant accordingly bought the goods as the goods of A.; and that A. was indebted to the defendant in a larger amount.

At the trial, it was proved that A. and B. were authorized by the plaintiffs to carry on the trade in the name of, and to sell the goods as and for the goods of "A. & Co."

The judge refused to allow the plea to be amended, under the 3 & 4 W. 4, c. 42, s. 23, by inserting therein the name of B., or by alleging that the goods were sold by A. and B.: but he directed the jury to find the facts specially, under s. 24.

The jury found "that A. was authorized to sell the goods as the goods of 'A. & Co.,' but not as the goods of 'A.;' and that 'A. & Co.' represented A. and B." :—

Held, that the amendment proposed was in a matter *material* to the merits, and therefore properly disallowed: and that judgment can only be given under s. 24 of the statute, in cases where the court think the variance *immaterial* to the merits.

DEBT, for 450*l.*, for goods sold and delivered by the plaintiffs, trading under the firm of George Willis & Co., to the defendant; with a count for the like sum due to the plaintiffs, trading as aforesaid, upon an account stated.

Pleas,—first, *nunquam indebitatus*,—secondly, as to the sum of 200*l.*, parcel of the moneys in the first count mentioned, and the causes of action in respect thereof, that, though true it is that the defendant was indebted to the plaintiffs, trading under the firm of George Willis & Co., in the said sum of 200*l.*, for goods sold and delivered by the plaintiffs, so trading as aforesaid, to the defendant, at the time in the first count mentioned; yet that the goods to him by the plaintiffs, so trading as aforesaid, sold and delivered, in respect of which he was so indebted, were certain goods of the plaintiffs, so trading as aforesaid, to wit, twenty

coats, twenty waistcoats, &c., theretofore, to wit, on the 1st of January, 1847, and on divers other days between, to wit, the 1st of January, 1847, and the 31st of December, 1848, by the plaintiffs, so trading as aforesaid, to the defendant *sold and delivered: That, before any [*577 of the said times, to wit, on the 31st of December, 1846, the plaintiffs, so trading as aforesaid, requested, authorized, empowered, and enabled one George Willis to trade, &c., as a tailor, under the firm of George Willis & Co.: That, afterwards, to wit, on the 1st of January, 1847, and until the 20th of February, 1849, the said George Willis, in pursuance of the said authority and request, did trade, &c., as a tailor, under the firm of George Willis & Co.: That afterwards, to wit, on the 1st of January, 1847, and on divers days between that day and the 31st of December, 1848, the plaintiffs, so trading as aforesaid, intrusted the said George Willis, so trading as aforesaid, with the said goods of the plaintiffs, so trading as aforesaid, and then, to wit, at the several times last aforesaid, requested, authorized, empowered, and enabled the said George Willis, so trading as aforesaid, to sell and deliver the same to such persons as he, so trading, should think fit, for and on his own account, so trading as aforesaid, and as and for his proper goods, so trading as aforesaid, and then requested, authorized, empowered, and enabled the said George Willis, so trading as aforesaid, not to disclose to, and then requested the said George Willis, so trading as aforesaid, to conceal from, such persons as he should sell and deliver the said goods to, that the said goods were the goods of, and were sold to such persons by, the plaintiffs, so trading as aforesaid, and then requested, authorized, empowered, and enabled the said George Willis, so trading, to represent to such persons that the said goods were the goods of the said George Willis, so trading, and that he had power to sell and deliver the same as and for the goods of the said George Willis, so trading as aforesaid: That afterwards, to wit, on the 1st of January, 1847, and on divers other days between that day and the 31st of December, 1848, the said George Willis, so trading as aforesaid, sold and *delivered the [*578 said goods to the defendant on account of, and as and for the goods of, him the said George Willis, so trading as aforesaid: That the said George Willis, so trading as aforesaid, did not at any time disclose to the defendant that the goods were the goods of the plaintiffs, so trading as aforesaid, and represented, at the several times, &c., that the said goods were his own proper goods, trading as aforesaid: That the defendant had not at any of the said times notice, or the means of knowing, that the said goods were the goods of the plaintiff, so trading as aforesaid: That, before he had any such notice, or means of knowing, and before the commencement of the suit, to wit, on the 6th of March, 1850, the said George Willis, so trading as aforesaid, was, and still is indebted to the defendant in a large sum of money, to wit, a sum equal to the said sum of 200*l.*, parcel, &c., and against which said sum so due

and owing from the said George Willis, so trading as aforesaid, to the defendant, the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiffs the full amount, &c. &c.

The plaintiffs joined issue on the first plea; and to the second, replied, that the said George Willis did not, so requested, authorized, empowered, or enabled by the plaintiffs as in that plea mentioned, sell and deliver the said goods to the defendant for and on account of the said George Willis, as or for the proper goods of the said George Willis, nor represent to the defendant that the said goods were the goods of the said George Willis, or that the said George Willis had the power to sell or deliver the same as or for the proper goods of the said George Willis, in manner and form as the defendant had in his said second plea alleged. Issue.

The cause was tried before CRESSWELL, J., at the second sitting in London in Michaelmas term last. It appeared that the firm of George Willis & Co., which consisted of *George Willis and L. Schmidt, *579] had carried on business as tailors; that, on the 25th of April, 1848, the firm assigned all the partnership effects to the plaintiffs, as trustees for their creditors; that the business still continued to be carried on under the firm of George Willis & Co., down to the month of September, 1848, when the plaintiffs relinquished it to Charles Willis and one Jay, who thenceforward traded under the name of Willis & Co.

Part of the goods had been supplied before the 25th of April, 1848: that part of the bill the plaintiffs did not seek to recover. Other part were furnished in the interval between the 25th of April, 1848, and the month of September, when the plaintiffs gave up the business to Charles Willis and Jay: that part amounted to 65*l*. The remainder were supplied after Charles Willis and Jay had taken the business.

The set-off was not disputed.

George Willis, it appeared, had been the active and managing partner throughout. But Schmidt, who was called as a witness for the plaintiffs, proved that he had acted in conjunction with George Willis, in the conduct of the business, between April and September, 1848.

On the part of the plaintiffs it was objected that there was a variance between the allegation in the plea, and the proof, inasmuch as the plea stated that the plaintiffs had authorized and empowered George Willis to sell the goods, and the evidence was that the persons who really did act under the authority of the plaintiffs, were, *George Willis and L. Schmidt*, and that the goods were sold, not as the goods and in the name of "George Willis," but in the name of "George Willis & Co."

It was thereupon proposed, on the part of the defendant, to amend the plea, under the 3 & 4 W. 4, c. 42, s. 23, by introducing the name of Schmidt, or by alleging that the goods were sold by "George Willis & Co." To this it was objected, on the part of the plaintiffs, that

*the proposed amendment was in a particular which was "material to the merits of the case;" for, that, if the plea had been originally framed as then sought to be amended, the plaintiffs would not have admitted the set-off. [*580]

The learned judge, thinking the amendment material, declined to allow it. It was thereupon agreed that the jury should be directed to find the facts specially, and that such finding should be endorsed upon the record, to be dealt with by the court under the provisions of the 24th section.(a)

The jury accordingly returned a verdict for the plaintiffs, damages 65*l.*, finding specially, "that George Willis was authorized to sell the goods as the goods of 'George Willis & Co.,' but not as the goods of 'George Willis,' and that 'George Willis & Co.' represented George Willis and L. Schmidt."

Byles, Serjt., in Michaelmas term last, moved for a new trial, on the ground of misdirection, and upon affidavits of surprise; or that judgment might be given "according to the very right and justice of the case," pursuant to the 3 & 4 W. 4, c. 42, s. 24. He submitted that the amendment prayed at the trial was in a matter not material to the merits of the case, or prejudicial to *the plaintiffs in the conduct of their [*581] action, and consequently that it ought to have been allowed; and that the finding of the jury was substantially in accordance with the facts alleged in the plea, and entitled the defendant to judgment thereon. [MAULE, J.—The plea alleges that George Willis was authorized to sell and did sell the goods *as his own*, and nothing else.]

Per Curiam.—The rule may go for a new trial, not upon the variance, but on the ground of surprise, or for judgment under the 24th section of the 3 & 4 W. 4, c. 42.

Montague Chambers and *W. J. Cooke* now showed cause.—They submitted that the affidavits did not establish such a case of surprise as to entitle the defendant to a new trial,—citing *Rearden v. Minter*, 5 M. & G. 204 (E. C. L. R. vol. 44), 6 Scott, N. R. 237, and *Tharpe v. Stallwood*, 5 M. & G. 760, 6 Scott, N. R. 715. As to the other point, they insisted that this was not a case to which the 3 & 4 W. 4, c. 42, s. 24, was applicable.

D. Keane, in support of the rule.—[JERVIS, C. J.—It is only when we think the variance immaterial to the merits, that we can act upon the 24th section.] In *Guest v. Elwes*, 5 B. & Ad. 118, 128 (E. C. L. R. vol. 27), which is the only case where this power was ever exercised by the

(a) Which enacts, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance [as mentioned in s. 23], instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document; and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

Thomas Williams, the defendant's servants, and of divers other persons, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, "I discharged that man for robbing me. He is a thief: and, if ever you (meaning the said John Jones and Thomas Williams) speak to him again, or have anything to do with him, I shall consider you as bad as him, and shall discharge you."

There was a second count, for words spoken to a person calling upon the defendant for the plaintiff's character. But it was admitted at the trial that that was a privileged communication.

The defendant pleaded not guilty, and a justification on the ground that the plaintiff had, whilst in the defendant's employ, stolen certain articles the property of the defendant. Upon these pleas issue was joined.

*The cause was tried before WILDE, C. J., at the sittings in London after Hilary term, 1848. It appeared, that the plaintiff [*584 had been in the service of the defendant, and had been dismissed on a Thursday, in consequence of some articles being missed, which he was suspected of having stolen; and that, when he went to the defendant's shop on the following Saturday to receive the wages due to him, the defendant called Jones and Williams, the other two servants, into the counting-house, and, speaking of the plaintiff, said to them—"I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him."

For the defendant, it was submitted that this was a privileged communication.

On the other hand, it was insisted, that the act complained of was perfectly gratuitous, not like a communication made to a confidential person, or a matter that the other servants had any interest in; and that it was a question for the jury, whether the statement was made under circumstances which indicated malice.

The lord chief justice was of opinion that this was a privileged communication, and that there was no evidence of malice, and consequently that the defendant was entitled to a verdict on the first issue. He, however, offered to go on and try the issue on the justification. This the plaintiff declined. His lordship thereupon directed a nonsuit to be entered.

E. James, in the following Easter term, obtained a rule nisi for a new trial, on the ground of misdirection.—He cited *Wright v. Woodgate*, 2 C. M. & R. 573.†

Byles, Serjt., in Trinity term, 1849, showed cause.—*The lord chief justice was right in holding the communication to be privileged, and directing a nonsuit, no express malice having been proved. [CRESSWELL, J.—Is a man justified in telling his servants that a third person is a thief?] The circumstances may justify it. If they are

likely to associate with him, and he believes the man to be a dishonest character, it is his duty, as well as his interest, to caution them against having any intercourse with him. In *Toogood v. Spyring*, 1 C. M. & R. 181,† 4 Tyrwh. 582, PARKE, B., thus lays down the rule:—"In general, an action lies for the *malicious* publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is *fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned*. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." And the law is similarly laid down by all the judges, in *Coxhead v. Richards*, 2 Com. B. 569 (E. C. L. R. vol. 52), *Blackham v. Pugh*, 2 Com. B. 611 (E. C. L. R. vol. 52), and *Bennet v. Deacon*, 2 Com. B. 628 (E. C. L. R. vol. 52). In such a case, malice is not to be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty: *Pater v. Baker*, 3 Com. B. 831 (E. C. L. R. vol. 54). To entitle the plaintiff to maintain this action, he *586] ought to have shown malice: it *was not enough to prove facts that were equally consistent with the presence or the absence of malice. In *Child v. Affleck*, 9 B. & C. 403 (E. C. L. R. vol. 17), 4 M. & R. 338, in an action for libel, it appeared that the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct to her whilst in that service, *and after she left it*; and the defendant also made similar parol statements to two persons who had recommended the plaintiff to her: it was held, that neither the letter itself nor the parol statements proved malice, and that consequently the letter was a privileged communication, and the plaintiff not entitled to recover. PARKE, J., there says: "The rule laid down by Lord MANSFIELD, in *Edmonson v. Stevenson*, Bull. N. P. 8, has been followed ever since. It is, that, in an action for defamation in giving a character of a servant, 'the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved.'"

E. James, in support of the rule.—The communication in question clearly was not privileged. A statement to the prejudice of a third person, to justify it, must be made in pursuance of some duty, legal or moral, or in answer to an inquiry *bond fide* made by some person having an interest in making it. [MAULE, J.—That is narrowing the rule too much: there are many cases in which volunteer statements have been

held to be privileged, when made *bond fide*. The question here is, whether the statement was privileged, assuming the defendant to have acted *bond fide* and without malice.] The rule is thus stated in Starkie on Slander, 2d edit. vol. I. p. 292: "The extensive principle which governs this class of cases, where the existence of express malice is a test of civil *responsibility, comprehends all where the author of the alleged [*587 mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform; as, on the one hand, it would be contrary to common convenience to fetter mankind in their ordinary communications, by the apprehension of vexatious litigation; so, on the other, it would be highly mischievous to allow men to inflict the most cruel injuries to reputation and character, with impunity, under the cloak and pretence of discharging some duty to themselves or to society, when they were, in fact, actuated by the most malicious intentions. The law, therefore, in such instances,—and, as it seems, most wisely,—makes the issue to depend on the existence or the absence of express malice; and thus an ample shield of protection is extended to all who act fairly and prudently, in order that men may not be deterred, by the fear of an action or prosecution, from making communications which are either important to themselves or beneficial to the public." The present case does not, it is submitted, fall within the reasoning of that learned author. The lord chief justice ought to have left the question of malice to the jury. The circumstances under which the slander was uttered,—the calling Jones and Williams into the counting-house for the express purpose of venting his ill-feeling towards the plaintiff in their presence,—were enough to justify the jury, without any extraneous evidence, in finding that the defendant was actuated by malice. In Wright v. Woodgate, 2 C. M. & R. 573,† it was held, that the meaning, in law, of a "privileged communication," is, a communication made on such an occasion as rebuts the *prima facie* inference of malice, arising from the publication of matter prejudicial to the character *of the plaintiff, and throws upon him the *onus* of proving malice in fact; [*588 but not of proving it by extrinsic evidence only: he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. In Pattison v. Jones, 8 B. & C. 578 (E. C. L. R. vol. 15), 3 M. & R. 101, it was held, that, where a master, without being applied to, volunteers to give an unfavourable character of a discarded servant, it is *prima facie* malicious, and not a privileged communication. Padmore v. Lawrence, 11 Ad. & E. 380 (E. C. L. R. vol. 39), is also a distinct authority to show that the question of malice or no malice ought to have been submitted to the jury. There the defendant, in the presence of a third person, not an officer of justice, charged the plaintiff with having stolen his property, and afterwards repeated the charge to another per-

son, also not an officer of justice, who was called in to search the plaintiff, with the consent of the latter : and it was held, that the charge was privileged, if the defendant believed in its truth, acted *bond fide*, and did not make the charge before more persons, or in stronger language, than was necessary ; but *that it was a question for the jury, and not the judge, whether the facts brought the case within this rule.* *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court.(a)

This was an action for words imputing theft, spoken by the defendant of the plaintiff. The defendant pleaded not guilty, and a justification.

*589] At the trial before WILDE, C. J., it appeared that the *plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft ; that he afterwards came to the defendant's house, and had some communication with the defendant's servants ; and that the words in question,—“ I have dismissed that man for robbing me ; do not speak to him any more, in public or in private, or I shall think you as bad as him,”—were spoken by the defendant to his servants.

The lord chief justice was of opinion that this was a privileged communication ; and that there was no evidence of malice ; and that the verdict must be found for the defendant on the general issue : but he offered to go on and try the issue on the justification. This the plaintiff declined ; and thereupon the lord chief justice directed a nonsuit to be entered.

The plaintiff obtained a rule nisi for a new trial, on the ground of misdirection.

It was contended for the plaintiff, upon the argument on showing cause, that the lord chief justice was mistaken in both respects, *i. e.*, that the communication was not privileged, and that there was evidence of malice.

But we think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bond fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge,—a supposition always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff ; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

*590] *We think, therefore, the communication in question was privileged, *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to show affirmatively that the words were spoken maliciously ; for,

(a) The case was argued in Trinity term, 1849, before WILDE, C. J., COLTMAN, J., MAULE, J., and CRESSWELL, J. The judgment was delivered on the 14th of December, 1850.

the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favour of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence: and *considering, as we have before observed, [*591 that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the lord chief justice was right in not leaving the question to them, and consequently that this rule must be discharged.

Rule discharged.

Privileged communications are of four kinds, to wit: Where the publisher of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; anything said or written by a master concerning the character of a servant who has been in his employment; words used in the course of a legal or judicial proceeding; and publications duly made in the ordinary mode of parliament-

ary proceedings. *White v. Nicholls*, 3 Howard S. C. Rep. 266. Words spoken by an employer to his overseer, intended to protect the employer's private interest and property, although no confidence was expressed at the time of speaking, and although the same words, published under other circumstances, would be slander, in the absence of evidence of express malice are not actionable. *Easley v. Moss*, 9 Alabama, 266.

KEATES v. THE EARL OF CADOGAN. *Jan. 20.*

There is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation: and no action will lie against him for an omission to do so, in the absence of express warranty, or active deceit.

THIS was an action upon the case. The first count of the declaration stated that the defendant, before and at the time of the committing of the grievance by him as thereafter next mentioned, was possessed of a certain dwelling-house, situate in the county of Middlesex, and which said dwelling-house, at the time of the committing of the said grievance, and of the making of the proposal and agreement, and of the plaintiff becoming tenant to the defendant, as thereafter mentioned, and thence until the plaintiff entered into and occupied and dwelt therein, as thereafter mentioned, was in such a ruinous and dangerous state and condition as to be dangerous to enter, occupy, or dwell in, and was likely wholly or in part to fall down, and thereby do damage and injury to persons and property therein, and which the defendant then, and during all the time aforesaid and hereinafter mentioned, well knew: That the plaintiff, without any knowledge, notice, information, or warning whatever, that the said house was in the said state and condition, or likely wholly or in part to fall down, to wit, on the 20th of November, 1848, *592] proposed to the *defendant that the defendant should demise to him, and that the plaintiff should take of him, as his tenant, for the purpose of the plaintiff's immediately occupying and dwelling in the same, the said dwelling-house, and also a certain yard adjoining to the same, for the term of three years from the 29th of September, 1848, at a certain rent and upon certain terms to be agreed upon between them: That the defendant, well knowing the premises, to wit, on the 20th of November, 1848, by an agreement in writing then made between the defendant, by one Daniel Price Owen, his agent in that behalf, of the one part, and the plaintiff of the other part, agreed to demise, and did demise to the plaintiff the said dwelling-house and yard for the said term of three years from the said 29th of September, 1848, at the yearly rent of 25*l.*, commencing from the day and year last aforesaid, payable quarterly, the first quarter to become due on the 25th of December, 1848, the plaintiff paying all rates, taxes, &c.; and the plaintiff thereby also agreed with the defendant to take, and did thereby take, the said dwelling-house and yard for the said term, and to pay the said rent in manner aforesaid, and the said rates, taxes, &c.: That the plaintiff thereupon then entered into and upon the said dwelling-house, and commenced occupying and dwelling therein: That, for and during all the time aforesaid, and from thence until the happening of the injury, loss, and damage as thereafter mentioned, he the plaintiff did not have any notice, knowledge, information, or warning whatever that the said house was in the said state and condition, so

as to be dangerous to enter, occupy, or dwell in or that it was likely wholly or in part to fall down; and the defendant, for and during all the time aforesaid, well knew that the plaintiff had not any such notice, knowledge, information, or warning, and believed that he could immediately after the making of the said agreement, enter into and upon, and occupy and dwell *in the said house: Breach, that, although the defendant could and might, before the making of the said agreement, and also [*598 before the plaintiff so entered upon and commenced occupying or dwelling in the said house as aforesaid, have given or caused to be given to the plaintiff notice, information, or warning that the said house was in the said state and condition, and likely wholly or in part to fall down; and although the defendant ought to have given or caused to be given to the plaintiff notice, information, or warning of that fact; yet that the defendant, not regarding his duty in that behalf, wholly omitted and neglected to, and did not, nor would at any time give or cause to be given to the plaintiff any notice, information, or warning whatever that the said house was in the said state and condition, and likely to fall down, but wholly neglected and omitted so to do; and that by means of the premises, afterwards, and shortly after the plaintiff had so entered into and upon, and commenced occupying and dwelling in, the said house, and whilst the plaintiff and his family were occupying and dwelling therein, and during the said term so granted to him therein as aforesaid, to wit, on, &c., a great part of the said house, by reason of its being in such ruinous and dangerous state and condition as aforesaid, fell down, and thereby became and was no longer habitable, and thereby the lives of the plaintiff and his family, occupying and dwelling in the said house, became and were greatly endangered, &c. The count then alleged for special damage, injury to the plaintiff's wife, and also to his goods, and delay of his business, &c.

Sixth plea,—that it was not the duty of the defendant to have given or caused to be given to the plaintiff such notice, information, or warning as in the first count mentioned, in manner and form as in the said first count alleged.

Special demurrer, and joinder.

**Cleasby*, in support of the demurrer.—The plea is clearly bad, for putting in issue that which is a mere matter of law. [*594 [*Needham*, contra, admitted that he could not sustain the plea.] The question then will be, whether there is a good cause of action disclosed upon the declaration. If there is, the plaintiff will not be prejudiced by any defective or improper statement of the duty which the law infers from the facts alleged. This is exemplified by the case of *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 223 (E. C. L. R. vol. 39). There, a declaration in case against a canal company, stated, that, by the canal act, 32 G. 3, c. ci., the company was formed to make and maintain the canal, with power to take tolls; and all persons had free liberty

to navigate the canal; and, if any boat should be sunk in the canal, and the owner or person having the care of it should not without loss of time weigh it up, it was, by the statute, to *be lawful* for the company to weigh it up, and detain it till payment of expenses; that the company completed the canal, and took tolls on it: that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could, and ought to have requested the owner, &c., to weigh it up, and, if that was not done without loss of time, could, and ought to have weighed it up, and, in the mean time, have caused a light or signal to be placed, to enable boats to avoid it: yet that the company did not cause the owner, &c., to weigh it up, nor themselves weigh it up, nor place a light or signal: and that thereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat, and was damaged. It was held, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the declaration disclosed a sufficient duty and breach. And it was further *595] held, by the Exchequer Chamber, that such *duty was not created by the clause *enabling* the company to weigh the boat, but arose upon a common-law principle, that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure; and that the want of such reasonable care might be collected from the declaration, although the complaint was ostensibly founded upon the statute. TINDAL, C. J., in delivering the judgment of the court of error, there says: (a) "Neither the clause recited, nor anything in the act of parliament contained, imposes such a duty (b) on the defendants below: and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause. But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law, in such a case, imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." Upon the same principle, if a man lets me a

(a) 11 Ad. & E. 242 (E. C. L. R. vol. 39).

(b) i. e. to remove the obstruction caused by the sunken boat.

*house to reside in, knowing it to be in a dangerous state, and likely to fall down, and injure me and my property, but, conceal- [*596 ing the fact, permits me to enter into the occupation, and the house falls, and I thereby sustain damage, the party so letting the house is clearly responsible for the consequences of his fraudulent concealment: for, every deceit done by one to the damage of another, gives a cause of action. [MAULE, J.—If a horse-dealer contracts to sell a gentleman a horse fit to carry him, and he sells him one which he knows to be unfit for the purpose, he does not perform his contract. But, if a man buys a horse generally, the seller will not be responsible, although, knowing that his customer wanted the horse for his own riding, he sells him one which will not carry him.] Suppose a man were to sell a farmer a shepherd's dog, knowing that the animal was accustomed to worry and destroy sheep, and he were to kill the purchaser's sheep which were intrusted to his care,—could any one doubt that an action would lie for this deceit? In Com. Dig. *Action upon the Case for a Deceit* (A. 1), it is said: "An action upon the case for a deceit lies when a man does any deceit to the damage of another." (A. 8), "If a merchant sell cloth that he knows to be badly fulled."(a) Concealment of material circumstances will vitiate all contracts. Thus, in *Hodgson v. Richardson*, 1 W. Blac. 463, it was held that concealment of the true port of loading would avoid a policy of insurance: and YATES, J., lays it down as a general proposition, that "the concealment of material circumstances vitiates all contracts, upon the principles of natural law." It may be that concealment as to a matter which merely affects the value, and not the use of the thing sold or let, will not give a cause of action. But, in all cases, an *action lies, where, but for the misrepresentation, the injured [*597 party would not have entered into the contract: *Levi v. Langridge*, 2 M. & W. 519,† 3 M. & W. 337.† [MAULE, J.—There was a perfectly good cause of action there: the only doubt was, whether the proper person sued. Besides, there was an actual fraudulent representation made there.] There is no distinction between an actual misrepresentation and a fraudulent concealment of something the knowledge of which, if communicated to the buyer, must necessarily prevent him from entering into the contract. In *Pilmore v. Hood*, 5 N. C. 97, 6 Scott, 827, the defendant being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month: B. having, to the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser, instead of B.,—it was held, that an action lay against the defendant at the suit of the plaintiff. In *Williams v. The East India Company*, 3 East, 192, also, the concealment of a material fact was held to give a ground of action. In *Cornfoot v. Fowke*, 6 M. & W. 358,†—where a false representation had been made by an agent upon letting a house to the defend-

(a) Citing 1 Rol. 90, *l.* 38; Kit. 174 *a.*

ant,—Lord ABINGER says : (a) “ Clarke, the agent, at least for letting the house, has in this case induced the defendant to enter into a contract by a false representation by no means free from moral turpitude, even upon the presumption that he was wholly ignorant of the matter. That the truth (b) was known to the plaintiff, is admitted; that he had an interest to conceal it, cannot be denied; nor can it be denied that it was concealed from the defendant. Whether his concealment was consistent *598] with good faith and free from *moral turpitude, may be determined by a reference to the case put by Cicero, in the third book of his treatise *De Officiis*; which I the rather mention because the house the sale of which he puts hypothetically, by way of example, was liable to an objection that bears some analogy to the present:—*‘Vendat ædes vir bonus propter aliqua vitia, quæ ipse nōrit, cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculus apparere serpentes; male materiatae, ruinosæ: sed hoc præter dominum nemo sciât: quero, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, num id injustè an improbè fecerit?’* He then gives the arguments on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. *‘Neque enim id est celare, quidquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.’* Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment; for, he says: *‘Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? certe non aperti, non simplicis, non ingenui, non justi, non boni viri; verè uti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri.’* Now, the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant’s plea, that he was induced by fraud, covin, and false representation, to sign the contract.” *Hill v. Gray*, 1 Stark. N. P. C. 434 (E. C. L. R. vol. 2), is precisely in point. There, the agent of the vendor of a picture, knowing that the vendee laboured under a delusion with respect to the picture, which materially influenced his judgment, permitted him to make the purchase, without *599] *removing that delusion: and the sale was held void. The facts were these:—A person named Butt had been employed by the plaintiff to sell the picture in question. The defendant, being desirous of purchasing it, pressed Butt to inform him whose property it was; which the latter refused to do. In the course of the treaty, Butt being at that time employed in selling a number of pictures for Sir Felix Agar, the defendant, misled by circumstances, erroneously supposed

(a) 6 M. & W. 380.†

(b) *Viz.* the existence of a nuisance, the non-existence of which had been averred by the agent.

that the picture in question was also the property of Sir Felix Agar. Butt knew that the defendant laboured under that delusion, but did not remove it; and the defendant, under this misapprehension, purchased the picture. The plaintiff offered to prove, by the testimony of the most eminent artists, that the picture was a genuine Claude, and of great value: and it appeared, that, after the sale had been completed, and after the defendant had been informed that the picture was not the property of Sir Felix Agar, he had objected to pay for it, not on the ground of any deception that had been practised with respect to the ownership, but on the ground that the picture was not a genuine Claude. But Lord ELLENBOROUGH said:—"Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. I take for granted that you will be able to prove, by the judgment of the first professional artists, that this is a genuine picture of Claude's: and it would not be possible to go further. In Italy, the fact might admit of other proof; as, where a picture has been long preserved in a particular cabinet: here, it *can only be proved by the concurrent judgment of artists as to its similitude. This case has [*600 arrived at its termination; since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment. I am of opinion that the contract is void." [CRESSWELL, J.—Do you say *this* contract is void?] It is submitted that the tenant might, at his election, have avoided it; or he may affirm the contract, and sue for the tort.

Needham, contra, was stopped by the court.

JERVIS, C. J.—I have felt some difficulty in consequence of the ruling of Lord ELLENBOROUGH in the case last cited. It would at first sight appear that his lordship there held, that the merely allowing the vendee to purchase the picture whilst labouring under a delusion with respect to it, which was calculated to enhance its value in his estimation, was ground for avoiding the contract. But, in *Hill v. Gray*, there was what must be taken to amount to an aggressive deceit on the part of the agent of the seller. "The agent," says Lord ELLENBOROUGH, "ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have *let in* a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet *he did not remove it.*" That shows something like an act done. That case being disposed of, I think

this declaration does not disclose a sufficient cause of action. It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation: but it is said, that, because the defendant knew that the plaintiff wanted it for immediate *occu-
 *601] pation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit: it was a mere ordinary transaction of letting and hiring. The defendant is entitled to judgment.

MAULE, J.—The declaration struck me, at first sight, as a perfectly bad one; and it does not improve upon acquaintance.

The rest of the court concurring,

Judgment for the defendant.

Where a vendor is guilty of a fraudulent concealment of material facts, in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages. *Fleming v. Slocum*, 18 Johns. 403. The fraud, however, is not to be presumed, but must always be proved. Where, therefore, in the sale of a slave, without warranty as to his good qualities, there was no other proof of a fraudulent representation, or a fraudulent concealment of facts, but what might be inferred from the fact that the vendee paid a sound and full price for a good and honest slave, but who proved to be bad and dishonest, and that the vendor knew at the time that he was so, this was held not to be sufficient evidence to support an action against the vendor to recover damages for a fraudulent concealment. *Ibid.* The mere omission of a seller to disclose a fact within his knowledge which would materially affect the

value of the article, is not a fraud upon the vendee; the suppression must be fraudulent. *Barnett v. Stanton*, 2 Alabama, 181. The mere fact that a representation is literally true, affords no excuse to the party making it, if made with the intention to deceive another, and he is deceived and thereby receives an injury. *Denny v. Gilman*, 26 Maine, 149. To entitle the purchaser of land to recover back the purchase-money paid by him, on the ground of fraud in the vendor, he must show satisfactorily that the vendor misrepresented some material fact affecting his title, or intentionally concealed some such fact from the plaintiff. *Camp v. Pulver*, 5 Barbour Sup. Ct. Rep. 91. Fraud in a party letting a slave, will not be inferred from the fact that the slave is unfit for the purpose for which he is hired, and that this was known at the time to such party. *Hewell v. Cowles*, 6 Grattan, 393.

*602] *DICKSON v. ZIZINIA and Another. Jan. 18.

Upon a contract for the sale of goods, with a particular express warranty, the court will not extend such warranty by implication.

The declaration stated a bargain for the sale by the defendants to the plaintiff of a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano, on board the Ottoman, at a certain price, including freight and insurance to Cork, Liverpool, or London, and that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of that article in the season of 1847, and that the said Indian corn had been shipped in good and merchantable condition; and alleged for breach, that the corn was not, at the time of shipment, or at any other time, in good and merchantable condition, or in a fit and proper condition for the performance of the voyage from Orfano to Cork, &c.

The judge left it to the jury to say whether the corn was, at the time of shipment, in a good and

22 C. L. 182.

merchantable condition for a foreign voyage:—Held, a misdirection; inasmuch as it was extending by implication the express warranty contained in the contract.

THIS was an action of assumpsit. The declaration stated, that, on the 19th of March, 1847, the plaintiff, at the request of the defendants, bargained for and agreed to buy of the defendants, and the defendants then sold to the plaintiff, a certain cargo, to wit, *the cargo* of Indian corn then shipped at Orfano, on board the Ottoman, at and for the price or sum of 56s. per quarter, free on board, including freight, insurance to Cork, Liverpool, or London, as per charter-party, calling at Cork for orders, &c., and that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of salonica that season, to wit, the season of 1847, and that the said Indian corn had been shipped, to wit, in and on board the said ship or vessel called the Ottoman, in good and merchantable condition: That, in consideration, &c., the defendants then promised the plaintiff, that the quality of the said Indian corn was equal to the average of the shipments of salonica that season, and that the said Indian corn had been shipped in and on board the said ship or vessel called the Ottoman in good merchantable condition: Breach, that the said Indian corn had not, nor had any part thereof, been shipped, nor was the same, or any part *thereof, [*608 at the time of the shipment thereof, or at any other time, in good and merchantable condition, or in a fit and proper state or condition to be shipped or put on board the said ship or vessel for the performance of the said voyage, to wit, from Orfano aforesaid, to Cork, London, or Liverpool aforesaid.

Pleas,—first, non assumpsit,—secondly, that the said Indian corn had been shipped in good and merchantable condition,—thirdly, that it was shipped in a fit and proper state for the performance of the voyage. Issue thereon.

The cause was tried before WILDE, C. J., at the sittings in London after Trinity term last. It appeared, that, at the time the contract declared on was entered into, the Ottoman was on her voyage,—the cargo having been put on board on the 19th of February, and the vessel having sailed on the following day. Ten days after her departure, the Ottoman put into Malta for provisions. Whilst there, it was discovered that the Indian corn was much heated, and emitted considerable stench; and the captain, acting upon competent advice, and exercising what appeared to be a sound discretion, sold the cargo for 630*l*. There was conflicting evidence as to the condition of the corn at the time of its shipment at Orfano; some of the witnesses stating that these cargoes generally arrived in bad condition, and nearly all agreeing that it was matter of doubt amongst merchants at the time this contract was made, whether the article would bear the voyage or not.

The lord chief justice intimated an opinion that the contract involved a warranty that the cargo should be shipped in such a state as to be fit

to bear the voyage; and he left two questions for the jury,—first, whether the corn was, at the time of shipment, in a good and merchantable condition *for a foreign voyage*,—secondly, *whether it was in a good *604] and merchantable condition, generally, for sale at the port of shipment.

The jury, answering the first question in the negative, but declining to answer the second, found a verdict for the plaintiff, damages 2250*l*.

Greenwood, in Michaelmas term last, obtained a rule nisi for a new trial, on the ground of misdirection.

Sir *F. Theiger* and *Bramwell* now showed cause.—The question is, whether this contract contains an implied warranty that the corn was in a good and merchantable condition for the voyage. The contract itself shows the purpose for which the corn was sold. The terms “good and merchantable condition,” must mean, either that the corn was shipped in a good and merchantable condition *for all purposes*, or that it was in a condition reasonably fit to bear the voyage for which it was shipped: and, in either case, the verdict is right. In the contract, the parties describe the purpose for which the corn was shipped. The sellers, knowing it to be shipped for Cork, or Liverpool, or London, guaranty that it is in a good and merchantable condition,—evidently meaning, good and merchantable with reference to the purpose contemplated by the buyer. The parties did not contemplate that the corn was shipped for the purpose of remaining at Orfano. There are, undoubtedly, many cases where it has been held, that, upon a sale of goods for a particular purpose, the law will imply a warranty that they are reasonably fit for that purpose: such are the cases of *Gray v. Cox*, 4 B. & C. 108 (E. C. L. R. vol. 10), 6 D. & R. 200 (E. C. L. R. vol. 16), *Jones v. Bright*, 3 M. & P. 155, 5 Bingh. 533 (E. C. L. R. vol. 15), *Brown v. Edington*, 2 M. & G. 279 (E. C. L. R. vol. 40), 2 Scott, N. R. 496, and *Shepherd v. Pybus*, 4 Scott, N. R. 434, 3 M. & G. 868 (E. C. L. R. vol. 42): *605] *though that rule, it is true, does not apply, where the contract is for the sale of a specific, ascertained chattel,—*Chanter v. Hopkins*, 4 M. & W. 399,† *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48), S. C. (per nom. *Oliphant v. Bayley*) Dav. & Meriv. 373, *Burnby v. Bollett*, 16 M. & W. 644,†—or where there is an express warranty. The direction, it is submitted, was right, and the verdict must stand.

Greenwood and *Bovill*, in support of the rule.—The direction was clearly wrong. The contract here was for the sale of a specific cargo of Indian corn, equal to the average shipments of the season, and shipped in good and merchantable condition: no warranty can be implied to a greater extent than that expressed in the contract. *Chanter v. Hopkins*, *Ollivant v. Bayley*, and *Burnby v. Bollett*, are distinct authorities to show that a warranty is not to be implied, where the sale is of a specific and ascertained chattel. The like was held in *Blewitt v. Osborne*, 1 Stark. N. P. C. 364 (E. C. L. R. vol. 2), *Barr v. Gibson*, 3 M. & W.

390,† and *Smith v. Jeffryes*, 15 M. & W. 56.† In *Parkinson v. Lee*, 2 East, 314, it was held, that, upon a sale of hops by sample with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and, therefore, that, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower, from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable. GROSE, J., there says: “If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. *But, if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact.” And, LAWRENCE, J., adds: “I know of no authority which makes the seller liable for a latent defect, where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing.” The Irish case of *Owens v. Dunbar*, 12 Irish Law Rep. 304, is almost identical with the present. That was assumpsit on the following contract:—“Sold this day, through D. B., of Cork, for account of M. O. (the plaintiff), of Galway, a cargo of Indian corn, per the *Ellen*, from Corunna, bill of lading dated February 24, 1847, at 71s. for 480 lbs., cash; payment to be made as follows,—500l. in cash to be paid on handing an order through the National Bank of Ireland, which order goes forward this day; remainder, less freight, to be paid on the arrival of the ship at Galway; the vessel to call at Cork for orders.” The declaration on this contract averred the promise of the defendant to be, the delivery to the plaintiff of a cargo of *marketable* Indian corn, and assigned as a breach that the defendant did not deliver the said cargo of Indian corn, but offered a cargo of other and different corn, which was not marketable, and which the plaintiff refused to accept. It was held that the declaration was not sustained by the contract; *there being in that contract no warranty that the cargo, on its arrival, would be of a marketable description*. BLACKBURNE, C. J., in delivering the judgment of the court, there says: “This is a sale-note of a particular cargo of a particular vessel,—a specific thing, of which the defendant knew at the time just as much as the plaintiff; both, in fact, were in actual ignorance of the state of the cargo: and we are now called upon to *imply a condition or warranty by the defendant that this specific cargo would be, on its arrival at Galway, of merchantable or marketable quality: that is calling on us to conclude that the defendant entered into an express warranty, that, after undergoing all the perils of the sea, the cargo would be marketable when it would reach Galway. The vessel arrives at Galway, and the cargo is tendered to the plaintiff, and refused by him: and the first question is,—is that the specific cargo

of Indian corn contracted for? Does it answer the description in the sale-note? There was no warranty; but, the cargo arriving in a bad condition, the plaintiff refuses to accept it, although that cargo was the very thing contracted for; and therefore the defendant sells it for 380%. How can the court say that cargo was not the very thing contracted for? The defendant had given no representation or description of the article, except as Indian corn: he did not warrant it to be in a marketable condition: all he sold, was a cargo of Indian corn per the *Ellen*, from *Corunna*." And, after referring to *Gardiner v. Gray*, 4 Campb. 144, and *Parkinson v. Lee*, the learned chief justice concludes: "We would be doing the greatest injustice, if, with reference to the time and manner of this contract, we were to imply a warranty which the party never contemplated." Where there is an express warranty, the court will not extend it by implication. The rule as to the construction of written instruments is laid down very clearly in the case of *Lady Hewley's Charity*.(a) Suppose this contract had been altogether silent as to the condition of the corn. The argument on the other side must be, that the law absolutely implies a fitness for the particular voyage, or for a foreign voyage. Assuming that to be so,—if you find that the contract *608] contains the limited condition or warranty that the cargo *is in a good and merchantable state at the time of shipment, the expression of the one condition of necessity excludes the implication of the other and more extended warranty. The learned judge, therefore, was clearly wrong in leaving it to the jury to say whether the corn was in a good and merchantable condition for a foreign voyage.

MAULE, J.(b)—I am of opinion that this rule should be made absolute. The question depends upon the true construction of the contract set out in the declaration: and, whether we look at it merely as it is stated there, or with reference to the state of things within the knowledge of the parties at the time the contract was entered into, I think it has not that meaning which Lord TRURO assumed that it had, in leaving the case to the jury. One question which his lordship left to them, was whether the corn, at the time of the shipment, was in a good and merchantable condition for a foreign voyage: he also left another question to them, in the terms of the second issue, viz., whether the corn was in a good and merchantable condition, generally, for sale, at the port of shipment. Whatever be the legal effect of these latter words, they are the very words of the contract. The jury did not think proper to find anything with respect to that question. But they did not come to a conclusion upon the first question: they said that the corn was not in a good and merchantable condition for a foreign voyage,—or for the voyage in question,—I am not quite certain which: but that is immaterial; for, I am of opinion that the true construction of the contract is, that the defendants warranted the

(a) *Shore v. Wilson*, 9 Clark & Fin. 355, 555.

(b) JENKIN, C. J. and CRESSWELL, J., were at the Court of Criminal Appeal.

corn to be good and merchantable only. This is the only conclusion I can come to, *whether I consider the circumstances under which the contract was made, or look at the terms of the contract alone. The declaration states that the plaintiff agreed to buy of the defendants *the cargo* of Indian corn then shipped at Orfano, on board the Ottoman; and it shows that there was an intention on the part of the purchaser to forward the corn by that vessel to a port in England or Ireland. Then come two express stipulations as to the quality and condition of the corn: the first is, not that it shall be good and merchantable, but that it was equal to the average of the shipments of salonica that season; and, further, the defendants add, that the said Indian corn had been shipped, to wit, on board the Ottoman, in good and merchantable condition. The first is a stipulation as to the quality of the corn; the second, as to its condition at the time of shipment. Now, nobody denies that these words would be sensible words, if they had no reference to any foreign voyage, or to any purpose for which the corn was destined by the purchaser. It is insisted, on the part of the plaintiff, that, though the words of the contract are capable of the construction I have put upon them, yet that, as it appears upon the face of the contract that the parties contemplated that the corn was to be sent to Cork, or to a port in England, that is to have the effect of changing the general stipulation that the corn is in a good and merchantable condition when shipped, into a special condition or warranty that it is good and merchantable for the purpose in view. I think that is not the proper construction of the contract: and we must not depart from the ordinary and proper construction of the words the parties have used, where that construction leads to no uncertainty or manifest inconvenience. Looking at the language of this contract, I think the proper mode of construing it, is, to hold it to be quite independent of the voyage on which *the corn was to be shipped. For anything that appears upon the finding of the jury, the corn may have been in a perfectly good and merchantable condition, and yet not fit for the voyage in question. It may be that no condition of Indian corn of the average of the shipments in the season of 1847, would enable it to reach Cork, Liverpool, or London, in good and merchantable condition. The plaintiff has taken that risk upon himself. It is very improbable that the parties should have entertained any other intention than that which appears to me to be the simple and obvious one. But, if we look at the evidence upon the subject,—which I think we may do, for the purpose of ascertaining what it is that the parties were contracting about,—it seems to me to be a thing very unlikely, that the sellers would undertake, with respect to this particular commodity, to warrant that it should be in a good and merchantable condition at the end of the voyage. Several cases as to implied warranties have been referred to. To these there are two answers,—first, that where there is a total silence as to

warranty in the contract, and all is left to implication, the law implies no warranty if the subject-matter of the contract is a particular and ascertained thing,—secondly, that, here, the parties have expressed the warranty they intended to be bound by. In giving the second answer to those cases, I assume that the construction which I put upon this contract is the true one. We should not, by inference, insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the *611] warranty. So, with respect to any other kind of *warranty: the maxim "*Expressum facit cessare tacitum*," applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down,—which would be manifestly inconvenient. I therefore think that this contract did not receive the proper construction at the trial, and therefore that the cause must go down again.

WILLIAMS, J.—I am of the same opinion. I think there is no legal principle, nor anything on the face of this contract, to warrant us in extending it as the plaintiff's counsel have insisted that it ought to be extended. The corn in question might well have been in the condition guarantied by the defendants, notwithstanding it might be unfit for a voyage from Orfano to this country. Therefore the question put to the jury did not dispose of the case. Rule absolute.

*612] *GEORGE RASHLEIGH and WILLIAM TWOPENNY v.
THE SOUTH EASTERN RAILWAY COMPANY.

A declaration in covenant recited a deed of the 2d of March, 1841, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements: in this deed, the piece of land in question was described as "a slip of land then being intended to be formed into a new course for the river Beult." The declaration then made profert of the deed of covenant upon which the action was brought, and stated that the defendants thereby covenanted with the plaintiffs, that they, the defendants, should and would, within a reasonable time, "at their own costs and expense, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river into the said intended new course for the same." It then went on to state a covenant to make a bridge over the intended new cut, for the plaintiff's use, within a given time, and a covenant to make good the banks of the new cut, and, after the same should have been so made good, and the railway completed, to reconvey to A., one of the plaintiffs, the slip of land which should form the new course of the river, and also to fill up and level the then existing course, so far as the same should have been diverted. The declaration then charged breaches of covenant, in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting its banks, in not re-conveying to A. the slip of land "with the water of the said river duly diverted into the

said new course," and in not filling up the existing course of the Beult, "so far as the stream thereof should and ought to have been diverted as aforesaid."

The defendants, after cravingoyer of the deed of covenant, and setting it out *in hæc verba*, demurred generally to the declaration.

The deed, as set out onoyer, did not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river; but it did contain express covenants to the effect of all the other covenants stated in the declaration:—Held, that there was no *implied* covenant on the part of the defendants to make the cut, and divert the stream of the Beult; and, consequently, that there could be no breach of the *express* covenants, to build the bridge, &c., unless the cut *was* made, and the stream diverted.

THIS was an action of covenant. The declaration stated, that, on the 2d of March, 1841, and after the passing of a certain act of parliament made and passed in the sixth year of the reign of His majesty, King William the Fourth, intituled "An act for making a railway from The London and Croydon Railway to Dover, to be called The South Eastern Railway," by a certain indenture then made between the plaintiffs of the one part, one Frances Rashleigh of the second part, the plaintiff George Rashleigh of the third part, and the defendants of the fourth part, and sealed with the seals *of the plaintiffs and the said Frances Rashleigh, but which indenture being in the possession of the defendants, the plaintiffs could not produce to the court here, the date whereof is the day and year aforesaid,—after reciting, amongst other things, that, by a certain indenture therein recited, three undivided equal fourth parts of a certain farm and hereditaments therein particularly described, and comprising, amongst other hereditaments, the several parcels of land and hereditaments by the said first-mentioned indenture conveyed, were assigned to the plaintiffs, their heirs and assigns, upon certain trusts therein mentioned, and, subject to such trusts, in trust for the plaintiff George Rashleigh, his heirs and assigns; and that, by certain other indentures of lease and appointment therein recited, the remaining undivided equal fourth part of the said farm was appointed to such uses as the plaintiff George Rashleigh should from time to time direct and appoint; and reciting that the said George Rashleigh had, for the consideration therein mentioned, contracted with the said company for the absolute sale to them of the entirety of certain parcels of the said land thereafter described, that is to say, as being the parcels of land described in a plan drawn in the margin of the said indenture, and therein distinguished by the pink colour, being part of the hereditaments which the said company were authorized and required to purchase for the purposes of their railway, that is to say, a certain piece or parcel of land running east and west, and now forming part of the line of The South Eastern Railway, and of the banks and fences thereof, and a certain slip or piece of land running in a south-westerly direction from a point near the eastern extremity of the said piece of land so contracted to be conveyed, for the purpose of forming a portion of the line of the said railway, the said slip of land then being intended to be formed into a new course for the river *Beult; and that, upon the contract for the said sale, it was agreed between the

parties thereto, that the said company should make a good and sufficient archway of brick or stone, of sufficient width for wagons, across the said intended new course of the said river Beult, on the south side of the said railway, for the exclusive use of the plaintiff George Rashleigh and his heirs and assigns, and his and their tenants, farmers, servants, and workmen; and that the said communication across the said bridge should be made in such a situation as should be determined on by the plaintiff George Rashleigh, his heirs and assigns, such determination to be signified by the plaintiff George Rashleigh in manner therein mentioned; and that the said bridge should be completed within three calendar months next after the permanent rails should be laid down; and that the company should, at their own costs, make good and perfect the banks of the said intended new course of the said river Beult, and should, so soon as the same should be made good and perfected, and the said railway should be completed, at their own costs, charges, and expenses, re-convey to the plaintiff George Rashleigh, his heirs and assigns, the said slip of land on the south side of the said railway, which should form the intended new course of the said river through the lands of the plaintiff George Rashleigh, after the same should have been so diverted as aforesaid, and also should, when and as soon as the intended new course of the said river should be completed, fill up and level the present course of the river, so far as the stream thereof should be so diverted as therein mentioned; and that it had been agreed between the parties to the said contract that the plaintiff George Rashleigh should forthwith convey, or procure to be conveyed, to the said company, as thereafter expressed, the said parcels of land and hereditaments therein comprised and hereinbefore mentioned, subject to the future

*615] *performance by the said company of such of the aforesaid stipulations on their part as had not then been performed; and that the plaintiff William Twopenny, at the request of the plaintiff George Rashleigh, had agreed to concur in the conveyance of the said undivided parts of the said hereditaments,—the plaintiffs did thereby grant, alien, and convey all the said undivided equal fourth parts or shares in the several pieces or parcels of land hereinbefore particularly mentioned, and described in the plan drawn on the margin of the said indenture, and thereon distinguished by the pink colour, and hereinbefore described and set forth, To hold the said land to the use of the said company, their successors and assigns, subject to the performance by the said company, their successors and assigns, of such of the thereinbefore-recited agreements on their part relating to the premises as remained to be then performed and discharged; and the plaintiff George Rashleigh did grant, confirm, and convey to the said company, their successors and assigns, all the undivided one fourth part or share of him the plaintiff George Rashleigh of or in the said several pieces or parcels of land thereinbefore described or referred to, and hereinbefore mentioned, the remaining three

fourths whereof had been thereinbefore assured or expressed to be so, To have and to hold the said undivided part thereby appointed and assured, unto and to the use of the said company, their successors and assigns, but subject to the performance by them of such of the agreements on their part therein recited, and relating to the premises, as remained to be then performed and discharged; and the defendants afterwards, to wit, on the day and year first aforesaid, by virtue of the said indenture, entered into the said several tenements and premises, and became and were thereof possessed, and had so continued possessed of the same from thence hitherto: That, on the said 2d of March, 1841, and after the *passing of the act of parliament thereinbefore mentioned, by a [*616 certain indenture then made between the defendants of the one part, and the plaintiffs of the other part,—profert,—after reciting, that, by the last-mentioned indenture of the 2d of March, 1841, for the considerations therein mentioned, the pieces or parcels of land hereinbefore mentioned, and described in the plan drawn in the margin of the said indenture, and thereon distinguished by the pink colour (a copy of which plan was also drawn thereon or thereunto annexed), had been effectually conveyed and assured to the use of the defendants, their successors and assigns; and that, upon the contract for the said sale to the defendants, it was agreed between the parties thereto that the covenants therein-after respectively contained should be entered into, and the defendants did thereby, for themselves, their successors and assigns, covenant, promise, and agree with and to the plaintiffs, their heirs and assigns, that they, the defendants, should and would, within a reasonable time after the making of the said covenants by the defendants as aforesaid, at their own costs and expense, make and cut the said intended new course for the said river Beult, and also within such reasonable time as aforesaid, divert the stream of the said river Beult into the said intended new course for the same, and should and would within such reasonable time as aforesaid, at their own costs and expense, make a good and sufficient bridge or archway of brick or stone, of sufficient width for wagons, across the intended new course of the river Beult, on the south side of the said railway, for the exclusive use of the plaintiffs, their heirs and assigns, and the plaintiff George Rashleigh, his appointees, heirs, and assigns, and their and his, and every of their tenants, farmers, servants, and workmen; and also that the said company should make and construct the said bridge in such a situation as should be determined on by the plaintiffs, their heirs and *assigns, or by the said George Rashleigh alone, his appointees, [*617 heirs, and assigns, such determination to be signified by the plaintiffs, their heirs or assigns, or by the plaintiff George Rashleigh, his appointees, heirs, or assigns only, by some writing under their or his hands or hand; and that the defendants should complete the said bridge within three calendar months next after the permanent rails of the said intended railway should have been laid down, and within a reasonable

time after the making of the said covenants by the defendants as aforesaid; and, further, that the said company should, within such reasonable time after the making of the said covenants by the defendants as aforesaid, at their own costs and charges make good and perfect the banks of the said intended new course of the said river Beult, and should and would, as soon as the same should have been so made good and perfected, and the said railway should have been completed and within a reasonable time after the making of the said covenants by the defendants as aforesaid, at their own costs, charges, and expenses, re-convey to the plaintiff George Rashleigh, his heirs or assigns, and without requiring any consideration for such re-conveyance, the slip of land on the south side of the said railway, which should form the new course of the said river Beult through the lands of the plaintiff George Rashleigh, after the same should have been so diverted as aforesaid, and should and would, when and as soon as the said intended new course of the river should have been completed, and within a reasonable time after the making of the said covenants by the defendants as aforesaid, fill up and level the said existing course of the said river, so far as the stream thereof should have been so diverted as aforesaid, *prout patet*, &c.: Averment, that, although a reasonable time for the completion of the said intended new course of the river, and for the making and construction and completion of the said bridge or *618] Beult, had elapsed long before the commencement of this suit,—and although the said permanent rails of the said then intended railway had been laid down for a long period of time, to wit, eight years, and more than three calendar months before the commencement of this suit,—and although a reasonable time for the perfecting of the banks of the said intended new course of the said river Beult, and for diverting the stream of the said river into the said new course, and for the re-conveying of the said new course of the said river to the plaintiff George Rashleigh, his heirs and assigns, and for the filling up and levelling of the said then-existing course of the said river Beult, had elapsed long before the commencement of this suit, and the said George Rashleigh had been at all times since the completion of the said railway ready to accept such re-conveyance, of which the defendants had always had notice,—nevertheless, the defendants, not regarding their said covenants in that behalf, did not nor would, within a reasonable time after the making of the said covenants by the defendants as aforesaid, make or cut the said new course for the said river Beult; and, on the contrary thereof, for divers long and unreasonable spaces of time, to wit, for the space of ten years after the making of the said covenants by the defendants as aforesaid, to wit, from the time of the making of the said covenants hitherto, neglected and refused so to do; nor did they, within a reasonable time after the making of the said covenants by the defendants as aforesaid, divert the stream of the said river Beult into the said intended new course

for the same, but, during divers long and unreasonable spaces of time, to wit, the space of ten years from the time of the making of the said covenants by the defendants as aforesaid, to wit, from the time of the making of the said covenants hitherto, neglected and refused so to do; nor did they *nor would they, within any such reasonable time as aforesaid, con- [*619
struct or make any bridge or archway over the said intended new
course of the said river Beult, on the south side of the said railway,
and, during divers long and unreasonable spaces of time, to wit, for the
space of ten years after the making of the said covenants by the de-
fendants as aforesaid, to wit, from the time of the making of the said
covenants hitherto, neglected and refused so to do: and although plain-
tiffs, and the said plaintiff George Rashleigh, since the making of the last-
mentioned indenture, had been at all times ready to signify to the de-
fendants, in writing under their hands, a proper situation for the said
bridge, nevertheless, by reason of the defendants' having, during such
long and unreasonable time as aforesaid, neglected to make or cut the
said new course for the said river Beult, the plaintiffs and the said plain-
tiff George Rashleigh had been always from the time of the making of
the said covenants by the defendants as aforesaid hitherto, prevented
from pointing out, and rendered wholly unable to point out, any situa-
tion for the construction and erection of the said bridge, and the same
was not, within a reasonable time after the making of the said cove-
nants by the defendants as aforesaid, completed by the defendants, but
had, during divers long and unreasonable spaces of time, to wit, for the
space of ten years after the making of the said covenants by the de-
fendants as aforesaid, to wit, from the time of the making of the said
covenants hitherto, remained uncompleted and unbuilt; nor did nor
would the defendants, within a reasonable time after the making of the
said covenants by the defendants as aforesaid, make or perfect the banks
of the said intended new course of the said river Beult; but, on the
contrary thereof, during divers long and unreasonable spaces of time,
to wit, the space of ten years from the time of the making of the [*620
*said covenants by the defendants as aforesaid, to wit, from the
time of the making of the said covenants hitherto, neglected and refused
so to do; nor did they, although they were thereunto, afterwards, and
after the expiration of a reasonable time after the making of the said
covenants by the defendants as aforesaid, duly requested by the plain-
tiffs and the plaintiff George Rashleigh, within any reasonable time
after the making of the said covenants by the defendants as aforesaid,
re-convey to the plaintiff George Rashleigh the said slip of land on the
south side of the railway, forming the new course of the said river
Beult, with the waters of the said river duly diverted into the said new
course, but, on the contrary thereof, during divers long and unreasona-
ble spaces of time, to wit, for the space of ten years from the time of
the making of the said covenants by the defendants as aforesaid, to wit,

from the time of the making of the said covenants hitherto, neglected and refused to re-convey the said slip of land to the plaintiff George Rashleigh, with the waters of the said river duly diverted into the said new course; and, although the stream of the said river should have been diverted from a large space of ground, to wit, two acres of the old course of the said river, yet the defendants did not nor would, within a reasonable time after the making of the said covenants by the defendants as aforesaid, but, on the contrary thereof, during divers long and unreasonable spaces of time, to wit, the space of ten years after the making of the said covenants by the defendants as aforesaid, to wit, from the time of the making of the said covenants hitherto, neglected and refused to, fill up and level the existing course of the said river Beult, so far as the stream thereof should and ought to have been so diverted as aforesaid; whereby the plaintiffs, during all such long and unreasonable spaces of time as aforesaid, *to wit, the space of ten years, had

*621] been deprived of the use, possession, and enjoyment of the said land from whence the river should have been so diverted as aforesaid, and during all such long and unreasonable spaces of time as aforesaid, to wit, the space of ten years, had been prevented by the continuance of the waters of the said river in the said old course, from having any convenient access for themselves, their tenants and servants, to, or any such full and ample enjoyment of, certain lands of the plaintiffs adjoining thereto, and lying between the said old course of the river and the said railway, as they otherwise would have had during all such periods as aforesaid; and, by reason that the waters of the said river, and the floods thereof, had been, during all such periods as aforesaid, to wit, for the space of ten years, hindered and prevented from running and flowing away in and along the said intended and proposed new course of the said river, and, on the contrary thereof, had, during all such periods as aforesaid, been penned back and prevented from running and flowing away from the lands of the plaintiffs so easily and rapidly as they would have done through the said intended new course of the said river, on the 1st of November, 1842, and on divers other days and times between that day and the day of the commencement of this suit, divers floods and large quantities of water ran and flowed from and out of, and over the banks of, the said river, and out of its usual and proper course and channel, into, upon, and about the farm-houses, farm-buildings, out-buildings, barns, farm-yards, stables, orchards, and closes of land of the plaintiffs, and inundated, saturated, and overflowed the same, whereby the said farm-houses, farm-buildings, &c., had become, and were, greatly deteriorated, and rendered of less value to the plaintiffs, and the grass and herbage and the soil of the said closes, had become and were greatly deteriorated and injured, &c.

*622] *The defendants craved oyer of the indenture secondly above mentioned, and demurred generally to the declaration. The

deed, as set out on oyer, was as follows:—"This indenture, made the 2d of March, 1841, between The South Eastern Railway Company of the one part, the Rev. George Rashleigh, of, &c., and William Twopenny, of, &c., of the other part: Whereas, by an indenture bearing even date with these presents, and made between the said George Rashleigh and William Twopenny of the first part, Francis Rashleigh of the second part, the said George Rashleigh of the third part, and the said South Eastern Railway Company of the fourth part, in consideration of the sum of 832*l.* paid by the said company to the said George Rashleigh, all those several pieces or parcels of land described, &c., have been respectively conveyed and assured unto and to the use of the said company, their successors and assigns: And whereas, upon the contract for the said sale to the said company, it was agreed between the said parties hereto that the covenants hereinafter respectively contained should be entered into: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the covenants respectively hereinafter contained on the part of each of them the said George Rashleigh and William Twopenny, they the said company do hereby, for themselves, their successors and assigns, covenant, promise, and agree with and to the said George Rashleigh and William Twopenny, their heirs and assigns, and also as separate covenants with and to the said George Rashleigh, his appointees, heirs, and assigns, in manner following, that is to say, that they the said company shall, at their own costs and expense, make, and for ever hereafter maintain, one good, substantial, and sufficient communication, with proper, safe, and convenient access on both sides for *wagons, cattle, and drivers, [623 across the said railway, by a crossing on the level, on the land comprised in and conveyed by the said hereinbefore-recited indenture, for the exclusive use, at all times hereafter, of the said George Rashleigh and William Twopenny, their heirs and assigns, and of the said George Rashleigh, his appointees, heirs, and assigns, and their and his, and every of their, tenants, farmers, servants, and workmen, and that the same communication shall at all times hereafter be opened for the use of the said George Rashleigh and William Twopenny, their heirs and assigns, and the said George Rashleigh, his appointees, heirs, and assigns, and their and his, and every of their, tenants, farmers, servants, and workmen, as they or he, or any of them, shall require: And also that the said company shall, at their own costs and expense, make a good and sufficient bridge or archway of brick or stone, of sufficient width for wagons, across the intended new course of the river Beult, on the south side of the said railway, for the exclusive use of the said George Rashleigh and William Twopenny, their heirs and assigns, and the said George Rashleigh, his appointees, heirs, and assigns, and their and his, and every of their, tenants, farmers, servants, and workmen: And also that the said company shall make and construct the said com-

munication across the said intended railway, and the said bridge, respectively, in such situations as shall be determined on by the said George Rashleigh and William Twopenny, their heirs or assigns, or by the said George Rashleigh alone, his appointees, heirs, or assigns,—such determination to be signified by the said George Rashleigh and William Twopenny, their heirs or assigns, or by the said George Rashleigh, his appointees, heirs, or assigns only, by some writing under their or his hands or hand; and that the said company shall complete the same *624] communication and bridge *respectively within three calendar months next after the permanent rails of the said intended railway shall be laid down: And further, that they the said company shall, at their own costs, make good and perfect the banks of the intended new course of the said river Beult, and shall and will, so soon as the same shall be so made good and perfected, and the said railway shall be completed, at their own costs, charges, and expenses, reconvey to the said George Rashleigh, his heirs or assigns, and without requiring any consideration for such reconveyance, the slip of land on the south side of the said railway which shall form the new course of the said river Beult through the lands of the said George Rashleigh, after the same shall have been so diverted as aforesaid; and will, when and so soon as the intended new course of the said river shall be completed, fill up and level the present course of the said river so far as the stream thereof shall be so diverted as aforesaid; and shall, during the progress of their works, well and sufficiently fence off the line of the said railway and diversion of the river from the other lands belonging to the said George Rashleigh and William Twopenny, or to the said George Rashleigh alone, not purchased by the said railway company; and shall and will, during the progress of the said works, provide for the said George Rashleigh and William Twopenny, their heirs and assigns, and the said George Rashleigh, his appointees, heirs, and assigns, and their and his, and every of their, tenants, farmers, servants, and workmen, proper and sufficient accommodation, across the said works, between the lands of the said George Rashleigh and William Twopenny, or the said George Rashleigh alone, on each side of the said works: And this indenture further witnesseth, that, in further pursuance of the said recited agree- *625] ment, and in consideration of the covenants *hereinbefore contained on the part of the said company, the said George Rashleigh doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said company, their successors and assigns, that they the said company, their successors or assigns, shall not at any time hereafter be required to make any other communication over, under, or across the said railway, on the said lands comprised in the said hereinbefore-recited indenture, or any part thereof, except such as are hereinbefore agreed to be made. In witness, &c."

The plaintiffs joined in demurrer.

Channell, Serjt. (with whom was *Willes*), in support of the demurrer.(a)—The question raised by this demurrer, is, whether the legal effect of the deed is well stated in the declaration. On the part of the defendants, it is submitted, that their covenant to build a bridge was only to come into operation if they found it necessary to divert the course of the river Beult. On the other hand it is insisted that the defendants were bound at all events to divert the stream and to build the bridge. There will be no dispute as to the general rule of law which governs the construction of covenants. In *Bac. Abr. Covenant* (A), it is said: "The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant: and therefore it seems that any words will be effectual for that purpose, which show the parties' concurrence to the performance of a future act; as, if lessee *for years covenants to repair, &c., [**626 provided always, and it is agreed, that the lessor shall find great timber, &c.*, this makes a covenant on the part of the lessor to find great timber, by the word *agreed*; and it shall not be a qualification of the covenant of the lessee." To constitute a covenant, however, the words must be such as to create a contract of some sort between the parties. The case which approaches the nearest to this probably is that put in *Com. Dig. Covenant* (A. 2), where it is said, that "any words in a deed, which show an agreement to do a thing, make a covenant; as if it be agreed, by articles between A. and B., that stock shall be in the hands of B. until a jointure be made, B. *solvendo proinde* the interests to A., covenant lies against B. for the interest:" for which passage *Comyns* refers to *Rolle Abr. Covenant* (C), pl. 7. So, in *Hollis v. Carr*, 2 Mod. 86, it was held, that articles of agreement reciting an intended marriage, covenanting to settle a jointure, in consideration of a marriage portion, and concluding thus,—"*and it is hereby agreed that a fine shall be levied, to secure the payment of the said portion,*" amount to a *covenant* to levy the fine. The defendants were empowered by the act of parliament to take certain land for the formation of the railway: and they covenanted with the plaintiffs to do certain things¹,—amongst others, to build a bridge for the accommodation of the plaintiffs, their tenants and servants, if they should find it necessary to divert the stream of the river Beult. But there is no covenant, either express or implied, that the stream shall be diverted; consequently, the covenants to build the bridge, and to do the other acts which were contingent upon the diversion of the stream, become inoperative.

Ogle, contrà.—The defendants have clearly incurred the legal liability

(a) The grounds of demurrer noted in the margin of the demurrer-book, were,—"*that the said indenture declared on, and as set out on oyer, contains no covenant by the company to divert the river Beult; and that the covenants contained in the indenture are conditional upon the said river being diverted; and, inasmuch as it appears that the said river has not been diverted, the said covenants have not become absolute, and the said company are not liable for the non-performance of the same.*"

*627] stated in the declaration. The deed *amounts to a covenant on their part that they will do the acts the omission to do which is charged against them. The deed shows that it was the intention of the parties that the course of the Beult should be diverted; and this was for the benefit of the defendants. [MAULE, J.—Which distinguishes this from the case of *Hollis v. Carr*; for, there, the fine was to be levied for the benefit of the conusee, the person to whom the land was to be conveyed. Suppose, here, the company do not wish to divert the stream at all: all that was meant to be done by that covenant is effected.] There is a clear covenant that the company will divert the stream and build the bridge. In *Rigby v. The Great Western Railway Company*, 14 M. & W. 811,† in covenant, the declaration alleged that the defendants, The Great Western Railway Company, demised to the plaintiffs certain refreshment-rooms at Swindon for ninety-nine years, at the annual rent of 1*l.*; that the plaintiffs covenanted (*inter alia*) to keep the premises in repair, and not to carry on there any other business than that of the refreshment-rooms; and that the defendants covenanted with the plaintiffs, that, in case the Swindon station should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiffs, on the terms therein mentioned; that it was by the said indenture *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by the plaintiffs in erecting the refreshment-rooms, the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return by the profits of the rooms; and that all trains carrying passengers, not goods trains or trains to be sent express or for special purposes, which should pass the Swindon station, should, save in case of emergency or unusual delay

*628] arising from accident, stop *there for refreshment of passengers for a reasonable period of about ten minutes; and that the defendants *covenanted* with the plaintiffs not to do any act *which should have an effect contrary to the above intention*. The breach alleged, was, that the defendants, whilst the Swindon station was used as the regular and general place of stoppage for the refreshment of passengers, did divers acts which had an effect and were contrary to the intention of the defendants in the said indenture, that is to say, they caused divers trains containing passengers, not being trains sent express, &c., to pass the Swindon station without stopping there for refreshment of the passengers for a reasonable period of ten minutes; and the defendants caused several trains to stop, and the same did stop, at Swindon, for a short and unreasonable time, to wit, for one minute, and no more,—the said period of time not being sufficient to enable the said passengers to obtain refreshment. The defendants set out the deed on oyer, which corresponded with the statement of it in the declaration, except that the terms of the covenant declared on were, that the defendants *engaged* not to do any act which

should have an effect contrary to the above intention. It was held, on demurrer, that this amounted to a covenant on the part of the company not to do any act to prevent the trains from stopping at Swindon, so long as it was used as the regular refreshment station; and that a good breach of that covenant was alleged in the declaration. PARKE, B., there says: "The deed, no doubt, is inartificially drawn. It is *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that 'in consequence of the outlay to be incurred by them in erecting the refreshment-rooms at Swindon, &c., the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return, by means of the rents and profits to be derived from the said refreshment-rooms; *and that all trains carrying passengers, not being goods trains [*629 or trains to be sent express or for special purposes, and except trains not under the control of the defendants, which should pass the Swindon station, either up or down, should, save in the case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes.' If there had been no other words than these, it might have been doubtful whether this was anything more than a declaration of intention on the part of the company that certain things should be done; although, in some cases, a declaration of intention is quite enough to create a covenant: there are cases in the books, of a declaration of an intention to levy a fine, which is said to amount to a covenant to levy a fine. But this particular part of the indenture does not stop here; there is an express engagement on the part of the company to do something; they 'engage' (which has the same force as the word 'covenant') 'not to do anything which shall have an effect contrary to the above intention;' that is, they are not to do anything which shall have the effect of causing the trains carrying passengers not to stop at Swindon for a reasonable period for refreshment." [MAULE, J.—There could not be much difficulty in deciding that "engage" means the same thing as "covenant." But I find no such word here.] The defendants *impliedly* covenant,—taking the whole deed together,—to make a new cut, and to divert the stream of the river Beult; and they *expressly* covenant to erect a bridge over the new cut, to perfect the banks thereof, to reconvey to the plaintiff George Rashleigh the slip of land forming the new course of the river, and to level and fill up the existing course.

Channell, Serjt., was heard in reply.

Cur. adv. vult.

*MAULE, J., now delivered the judgment of the court.

This was an action of covenant on an indenture of the 2d of [*630 March, 1841, between the plaintiffs and the defendants.

The declaration recited a deed of conveyance of the same date, whereby two pieces of land were conveyed to the defendants, subject to the performance by the defendants of certain agreements therein recited, and which are to the effect of the covenants contained in the indenture

afterwards set out on oyer by the defendants. In this deed of conveyance, the piece of land principally in question is described as "a slip of land then being intended to be formed into a new course for the river Beult." The declaration then made profert of the deed of covenant declared on, and stated that the defendants thereby covenanted with the plaintiffs, that they, the defendants, should and would, within a reasonable time, "at their own costs and expense, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river Beult into the said intended new course for the same." The declaration went on to state a covenant to make a bridge over the intended new cut, for the use of the plaintiff, within three calendar months after the permanent rails of the said intended railway should have been laid down; and also a covenant to make good the banks of the new cut; and, after the same should have been so made good, and the railway completed, to re-convey to the plaintiff George Rashleigh the slip of land which should form the new course of the river Beult; and also to fill up and level the then existing course of the river Beult, so far as the same should have been diverted. The declaration then stated breaches of covenant, in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting the banks of *631] the new cut, *in not re-conveying to the plaintiff George Rashleigh the slip of land, "with the water of the said river duly diverted into the said new course," and in not filling up the existing course of the Beult, "so far as the stream thereof should and ought to have been diverted as aforesaid."

The defendants, after craving oyer of the deed of covenant, and setting it out *in hæc verba*, demurred generally to the declaration.

The deed, as set out on oyer, does not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river; but it does contain express covenants to the effect of all the other covenants stated in the declaration.

The question raised by the demurrer, and discussed on the argument, is, whether the declaration shows any breach of any covenant which is contained in the deed set out on oyer. The matters stated in the declaration by way of breach, are,—first, the omission to make a new cut, and to divert the stream of the river, which the plaintiff contended was a breach of an implied covenant,—and, secondly, the omission to make a bridge over the new cut, and to do other things, which it was said were breaches of express covenants. But, as this second class of breaches consists entirely of the omission to do things which are incidental to and dependent on the making the new cut and the diversion of the stream, there is no breach of covenant in not doing them, unless the new cut has been made, and the stream diverted; or unless the defendants have covenanted to make the cut, and divert the stream, and have failed to

do so. The declaration does not show that the cut has in fact been made, or the stream diverted; and therefore the question on these breaches, as well as on the first mentioned, is that which alone was discussed on the argument, that is, whether the deed, as set out by the *defendants, does contain a covenant to make the new cut and divert [682 the stream. No such covenant is contained in the express terms of the deed: the question, therefore, is, whether it can be implied.

It was rightly conceded, on the argument, and is undoubted law, that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose, which show an intention to be bound by the deed to do or omit that which is the subject of the covenant: any such words are sufficient, and some such words are necessary, to make a covenant. It was argued, in the present case, that the several covenants by which the defendants bound themselves to do certain things (as, to build a bridge over the new cut, and fill up the old course of the stream, after it had been diverted, and to re-convey the slip forming the new course of the river), which are incidental to, or to be done after, the new cut is made, and the stream diverted, being in their terms absolute, and not conditional on the making of the new cut and diversion of the stream, show a clear intention that the defendants meant to bind themselves to do that principal act of making the cut and diverting the stream, to which the things which they in express terms absolutely covenanted to do, were incidental.

But we think that such an intention cannot properly be inferred: the true inference, as it appears to us, is, that the parties to the deed both of them expected that the new cut would be made, and the stream diverted, and entered into the contract in question under that expectation,—treating it as a thing that was certain to take place, and providing for that event only: but it by no means follows from this state of things, that the parties intended that the defendants should bind themselves by the deed to make the cut, and divert the stream, any more than a covenant to lay down the permanent rails, *or to complete the railway, [683 is to be inferred from the covenants to do certain things after those events. No reason has been suggested, why, if the defendants were really intended to be bound as the plaintiffs contend, in a deed of which the sole object is to express the covenants by which the defendants were to be bound to the plaintiffs, the principal thing to be done by the defendants should be left to implication, and the incidental matters minutely provided for.

If the event which has taken place, that is, the abandonment by the defendants of their intention to divert the stream, had been contemplated by the parties, it is very improbable that they would have provided for it by a covenant compelling the defendants to do that which they no longer considered beneficial or proper for their works. Such a

state of things would have rather been the subject of special provisions, for the benefit of the plaintiffs, applicable to it.

Such a state of things, it appears to us, was either not contemplated at all, or, if contemplated, was thought so improbable as not to be worth providing for; the parties being content, in such an event, to adjust their rights as they might be able, by agreement, or to leave them to be arranged by a competent tribunal.

As it appears to us, for these reasons, that there is no such implied covenant as the plaintiffs contend for, and therefore no cause of action shown in the declaration, there must be judgment for the defendants.

Judgment for the defendants. (a)

(a) A writ of error was brought upon this judgment, and the case underwent some discussion in the Exchequer Chamber: but ultimately the parties agreed to refer all matters in difference between them to an arbitrator.

*634]

*STEWART v. COLLINS. Jan. 20.

The 224th section of the bankrupt law consolidation act, 12 & 13 Vict. c. 106, makes a deed of arrangement, if executed by or on behalf of *six-sevenths* in number and value of the creditors of the trader, under certain circumstances, binding on the whole body:—Held, that a plea setting forth a deed of that description, and stating that the creditors who executed it were "*more than six-sevenths, to wit, nine-tenths* in number and value," was sufficient, on special demurrer, and not open to the objection of argumentativeness or immateriality.

THIS was an action of debt, for goods sold and delivered, and for money found due upon an account stated.

The defendant pleaded,—first, as to all except 22*l.*, parcel, &c., *nunquam indebitatus*,—secondly, as to 22*l.*, parcel, &c., and the causes of action in respect thereof, a plea to the further maintenance of the action similar in form to the plea in *Phillips v. Surridge*, 9 Com. B., 1 L. M. & P. 458. After setting out a deed between the defendant and certain of his creditors, whereby the latter covenanted and agreed, amongst other things, not to molest or sue the defendant for any of their debts until the 26th of February, 1852, and that, in case they did so, that deed should operate as a release, and might be pleaded in bar to any suit for such debts,—the plea stated, that the said indenture, at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and his creditors, within the meaning of the 12 & 13 Vict. c. 106, and that the creditors by whom and on whose behalf the same was sealed as aforesaid, *were more than six-sevenths, to wit, nine-tenths*, in number and value of the creditors of the defendant, within the meaning of the said statute, whose debts amounted, within the meaning of the said statute, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property
*685] and other such available *securities or liens from the defendant, appeared to be the balance due to him; that the plaintiff was, at

the time of the making of the indenture, a creditor of the defendant in respect of the causes of action in the introductory part of the plea mentioned, and that the amount in the introductory part of the plea mentioned was then a debt due from the defendant to the plaintiff, within the meaning of the said indenture; that, after the sealing of the said indenture as aforesaid, the plaintiff had notice of the defendant's suspension of payment, and of the said indenture, and was requested by the defendant to sign the same as one of the parties of the third part; that three calendar months from the time when the plaintiff had notice of the said suspension, and of the said indenture, had expired since the commencement of the suit; that the defendant had in all respects performed the covenants in the said indenture on his part to be performed; that the trustees appointed in and by the said indenture had assented and had acted; that, by reason of the premises, and by force of the statute aforesaid, the said indenture, after the commencement of the suit, and before the plea, became as obligatory on the plaintiff as if he had signed the same; that the time limited by the indenture had not elapsed; and that, by reason of the premises, and of the prosecution of the suit, the defendant theretofore, and after the commencement of the action, to wit, on, &c., became and was released and discharged from the said causes of action in the introductory part of the plea mentioned, —verification and prayer of judgment.

The plaintiff demurred specially to the second plea, assigning for causes, amongst others, that the plea did not directly allege that the deed therein mentioned was signed or executed by or on behalf of *six-sevenths* in number and value of the defendant's creditors mentioned *in that plea, within the meaning of sections 224 and 225 of the 12 & 13 Vict. c. 106;(a) and that the plea was argumentative, [*636 and tended to raise an immaterial issue. Joinder in demurrer.

(a) Section 224 enacts "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of *six-sevenths* in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be, or be liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from such trader, shall appear to be the balance due to him."

And s. 225 enacts "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months(b) from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall, within such time, obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by

(b) "Calendar months:"

*637] *S. Temple*, in support of the demurrer.—The plea sets up, in bar of the further maintenance of the action, a deed of arrangement, under the 224th section of the bankrupt law consolidation act, 12 & 13 Vict. c. 106, which, under certain circumstances, makes a deed “signed by or on behalf of *six-sevenths* in number and value of those creditors whose debts amount to 10*l.* and upwards,” as obligatory upon all the creditors who shall *not* have signed such deed, as if they *had* signed it. The plea, however, does not in direct terms allege that the deed was signed by *six-sevenths* in number and value of the defendant’s creditors; but merely “that the creditors by whom and on whose behalf the same was sealed as aforesaid, were *more than six-sevenths*, to wit, *nine-tenths*, in number and value of the creditors,”—an allegation which is too uncertain to enable the plaintiff to take an issue upon it. The defendant was bound to bring himself strictly within the act. [MAULE, J.—No doubt the direct allegation would be, that *six-sevenths* in number and value had executed the deed. You say that it is an argumentative way of saying that, to say that more than *six-sevenths* executed it.] Precisely so. In *Burroughs v. Hodgson*, 9 Ad. & E. 499 (E. C. L. R. vol. 36), 1 P. & D. 328, it was held, that, where a court of requests has exclusive jurisdiction of debts up to a certain amount, the plea must state in terms that the defendant was not indebted beyond that amount: it was not sufficient to allege that he was not indebted in beyond a smaller sum, which is specified; for, a plea must be so shaped that the averments, if traversed, will be material and conclusive, whether found for the plaintiff or defendant; and that averment would not be so, if found for the plaintiff. In delivering the judgment of the court in that case, Lord DENMAN says: “If any averment at all as to the amount of the debt be necessary, the form commonly *used is clearly the
*638] correct and proper one, namely, that the defendant was not indebted to the plaintiff ‘in any sums of money amounting to 40*s.*,’ or ‘to the amount of 40*s.*’ On such an averment, a material issue might be taken; and, though it is true, that, if the present averment be traversed, and found for the defendant, it would be material and conclusive, yet, if found for the plaintiff, it would be otherwise. The plaintiff, however, is entitled to have the plea of the defendant so framed as that the averments in it, if traversed, will be material and conclusive, whichever way they may be found; and their not being so framed is a good ground of demurrer.” That case was acted upon in *Parker v. Gill*, 5 D. & L. 21. There, to an action on an attorney’s bill, the defendant pleaded, that the plaintiff did not deliver, “one month” before bringing

or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate, on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days’ notice of any intended application for such order or certificate as aforesaid shall be bound thereby.”

the action, a signed bill of his fees, "pursuant to the statute in such case made," "contrary to the form of the said statute:" the 6 & 7 Vict. c. 73, s. 37, requires a bill to be delivered "one month" before bringing an action; and by the interpretation clause "month" is declared to mean "calendar month:" it was held, on special demurrer, that the word "month" in the plea must be taken to mean "lunar month;" that the words "pursuant to the statute," &c., would not enable the court to construe it as "calendar month;" and that, as the act required a delivery a "calendar month" before the action, the plea was bad, as tendering an inconclusive and immaterial issue. [WILLIAMS, J.—If the plea alleged that six-sevenths of the creditors signed the deed, and the defendant proved that it was executed by more than that number, would not the plea be proved? MAULE, J.—To say that a man is not alive, is perhaps an argumentative way of saying that he is dead. Is not this substantially an allegation that six-sevenths in number and *value of the creditors did execute the deed?] The question is, whether [*639 it is so alleged as to permit of its being traversed by a simple negation. Suppose the plea had alleged that *all* the creditors had signed, it clearly would not be a good traverse to say that six-sevenths had not signed. If the plaintiff were to traverse that the creditors who signed were nine-tenths in number and value, the issue raised would be an immaterial one; for, though the defendant should fail to prove that nine-tenths had signed, it would not follow that six-sevenths had not. And, on the other hand, if the plaintiff were to reply that the creditors who signed were not six-sevenths in number and value, inasmuch as the plea does not allege that they were, the replication must conclude with a verification,—and so the burthen of proof would be improperly cast upon the plaintiff.

Ball (with whom was *Byles*, Serjt.), *contra*.—This form of plea underwent very strict scrutiny in the case of *Phillips v. Surridge*, 9 Com. B., 1 L. M. & P. 458, and this point was not suggested. [JERVIS, C. J.—The whole court seem to treat the plea as a very indifferent one.] The statute requires, that, to bind the general body of creditors, the deed of arrangement shall be signed by six-sevenths in number and value: the plea states that more than that number signed the deed: it would be a perfectly good traverse of that plea, to reply that six-sevenths in number and value did not execute. [CRESSWELL, J.—*Parker v. Gill* is a totally different case from this: the 6 & 7 Vict. c. 73, s. 37, requires an attorney's bill to be delivered one *calendar* month before action, and the plea was, that a bill had not been delivered a *lunar* month before action. And in *Burroughs v. Hodgson*, 9 Ad. & E. 499 (E. C. L. R. vol. 36), 1 P. & D. 328, the plaintiff had no *opportunity of tra- [*640 versing anything in the plea. Here, the plaintiff has an opportunity of taking a good traverse of that which is the substance of the plea.] *Non est factum* would be a perfectly good traverse. The act,

as MAULE, J., observes, in *Phillips v. Surridge*, "makes the six-sevenths attorneys for the other seventh:" the plaintiff, therefore, would be bound, upon *non est factum*, to prove the execution of the deed by at least six-sevenths.

Temple, in reply.—The traverse suggested would not relieve the plaintiff from the difficulty of which he complains. The observation of MAULE, J., in *Phillips v. Surridge*, was intended to apply to a totally different matter.

JERVIS, C. J.—I think we may consider here that the defendant is merely stating his defence; and, if he states the facts which amount to such defence correctly, I think he states them sufficiently. He states that a deed of arrangement was entered into between him and his creditors, under the stat. 12 & 13 Vict. c. 106, and that "the creditors by whom and on whose behalf the same was sealed as aforesaid, were more than six-sevenths, to wit, nine-tenths, in number and value," of such creditors. If any difficulty arises from that form of plea, the defendant cannot help it. I do not agree that the statement is an argumentative one. I think it is the substance of the defence.

MAULE, J.—I am of the same opinion. I think the defendant was not bound to draw attention to the statute. He was bound to state some matter which amounts to a defence. It is a defence, if, under the circumstances stated in this plea, nine-tenths of the creditors have *641] signed the deed. The defendant says that the creditors *who executed were "more than six-sevenths, to wit, nine-tenths." If the plaintiff denies any portion of the defence, he is entitled to do so; so, if he admits the matter alleged in the plea, and shows that it affords no defence in law, he is entitled to do that. Where the plaintiff in his replication states some matter which is inconsistent with the defence stated in the plea, if it is in terms a contradiction of an allegation in the plea, the modern practice is, to conclude to the country. Anciently, when more attention was paid to special pleading, and when it was better understood than it is now, the course was, to select some one matter in a replication or other pleading, and to traverse that, and conclude to the court, and not to the country. That was the case even where the inconsistent matter was an allegation that something is not, or was not, which in the plea was alleged to be, or to have been,—so that there was a regular *est*, and *non est*, in the plea and replication. I conceive here, supposing the true replication is, that the deed was not executed by six-sevenths in number and value of the defendant's creditors,—and I think that is a replication which he clearly might make,—whether it would properly conclude to the country or not, will depend upon whether we consider the allegation in the plea as an allegation that six-sevenths executed the deed. If it be taken to be equivalent to an allegation that six-sevenths executed, then, according to the modern practice, the replication ought to conclude to the country. But, if it is

not to be so taken, then the allegation in the replication would be inconsistent with something in the plea, and then it should conclude with a formal traverse. Some how or other, no doubt, the plaintiff might get to the proper issue. When a defendant states the matters of fact which have occurred, and which amount to a defence, he is not to be prejudiced because some difficulty is thrown on the other side. *It seems [*642 to me that the law of the case is in conformity with the justice. Whether or not a court of error will take the same view of the plea, I am not prepared to say. But, as at present advised, I think the defendant must have judgment.

CRESSWELL, J.—I am of the same opinion. Mr. *Temple* could hardly contend that a deed executed by nine-tenths of the creditors would not afford a defence. If so, it would be hard if a plea stating that fact should be held insufficient. The allegation in the plea, in effect, amounts to a statement that the deed was executed by six-sevenths and more.

WILLIAMS, J.—I am of the same opinion. The plea, it is true, contains an allegation more extended than was required to constitute a defence. But it was not necessary for the plaintiff to traverse the allegation in its extended shape. On the contrary, he must take care to narrow his traverse so as to meet what is the real defence.

Temple prayed leave to reply, on terms,—an indulgence which he submitted the plaintiff was entitled to in consequence of the difficulty cast upon him by the form of the plea.

MAULE, J.—It is substantially a good plea. A plaintiff who specially demurs to a plea which we think a good one, is not entitled to favour.

Judgment for the defendant.

*NOSOTTI v. PAGE. Jan. 14.

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In debt, the particulars delivered were as follows:—"This action is brought to recover the sum of 1*s.* damages for the detention of the debt for which this action is brought, together with costs of suit; the debt of 86*l.* 9*s.* having been paid by the defendant to the plaintiff since the action was brought."

At the trial, the plaintiff proved a debt to the extent of 52*l.* 10*s.* only, and the verdict was entered for that sum and 1*s.* damages:—Held, that it was properly entered.

THIS was an action of debt, for goods sold and delivered, and for money found due upon an account stated.

Plea, never indebted.

The particulars of demand delivered with the declaration, were as follows:—"This action is brought to recover the sum of 1*s.* damages for detention of the debt for which this action is brought, together with costs of suit,—the debt of 86*l.* 9*s.* having been paid by the defendant to the plaintiff since the action was brought."

The cause was tried before JERVIS, C. J., at the sittings at Westminster after last term. The defence,—that the credit for the goods had not expired at the time of action brought,—was negatived by the jury, and a verdict was found for the plaintiff for 52*l.* 19*s.* the debt proved, and 1*s.* damages.

D. Keane now moved, pursuant to leave, to enter a nonsuit, or to reduce the verdict to 1*s.*, in conformity with the particulars, or for a new trial.—The particulars showing that the debt for which the action was brought had been satisfied, the plaintiff ought to have been nonsuited. *Beaumont v. Greathead*, 2 Com. B. 494 (E. C. L. R. vol. 52), is an authority in point: there, A., being sued on a joint and several promissory note made by himself and by B. and C., pleaded that he paid to the plaintiff, and the plaintiff accepted and received, the moneys in the declaration mentioned, in full satisfaction and discharge of the debt **and damages* in the declaration mentioned; and it was *644] held that the plea was sustained by proof that the amount of the note was paid by C.; and that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note. In *Gell v. Burgess*, 7 Com. B. 16 (E. C. L. R. vol. 62), a declaration in debt contained three counts,—the first on a bill of exchange, the second for money lent, and the third upon an account stated, concluding, to the plaintiff's damage of 10*l.*, &c.: the defendant pleaded,—first, as to 10*s.*, parcel of the moneys in the first and last counts (averring identity), payment and acceptance in satisfaction before action brought,—secondly, as to the residue of the first and last counts, payment and acceptance, after action brought, of 50*l.*, in satisfaction and discharge “of the *causes of action* in the introductory part of the plea mentioned,”—thirdly, to the second count, never indebted: it was held, that the second plea sufficiently answered the *damages* for the detention of the moneys mentioned in the first and third counts. [MAULE, J.—There can be no doubt that the plaintiff was entitled to nominal damages for the detention of the debt.] At all events, the plaintiff was bound to prove a debt to an equal or a greater amount than that for which he gave credit in his particulars. In *Eastwick v. Harman*, 6 M. & W. 13,† it was held, that, where a plaintiff gives credit in his particulars of demand, for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and that, if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict. [MAULE, J.—In that case the defendant had a verdict.] Justice will be done here if the verdict is entered pursuant to the particulars, viz., for 1*s.*

*JERVIS, C. J.—I think we have no authority to enter the verdict as prayed. It would be erroneous.

MAULE, J.—The defendant has nothing to complain of at present.

He clearly ought to pay the costs of the action. If execution is issued for more than the 1*s.* damages and the costs, he may then apply to the court for relief.

The rest of the court concurring,

Rule refused.(a)

(a) And see *Randall v. Moore*, post, Vol. XII.

HUSBAND v. DAVIS. Jan. 18.

A plea of *part payment, post diem*, to debt on bond, is a good plea, under the 4 Anne, c. 16, s. 12, after verdict.

Payment of a bond debt to one of two trustees, is a good discharge as to both.

THIS was an action of debt on bond. The declaration stated, that, by an indenture of the 16th of December, 1842, the defendant agreed to pay to the plaintiff and Robert Hart 1000*l.* on the 21st of May then next, and interest in the mean time at 5*l.* per cent.; that Robert Hart died on, &c.; that the defendant did not pay to the plaintiff and Robert Hart in Robert Hart's lifetime, nor to the plaintiff since Robert Hart's death; and that the principal sum of 1000*l.*, and 125*l.* for interest, were due from the defendant to the plaintiff.

The defendant pleaded, as to 200*l.*, parcel of the 1000*l.*, and as to 25*l.*, parcel of the 125*l.*, that the said sum of 25*l.* was claimed as interest on 200*l.*, parcel, &c., for two years and a half; and that the defendant, before the commencement of the said period of two years and a half, to wit, on the 21st of May, 1847, and in the lifetime of Robert Hart, paid Hart the sum of 200*l.*, which Hart then accepted and received in full satisfaction and discharge of the sum of 200*l.*, parcel, &c.

*The replication traversed the payment and acceptance of the 200*l.* by Hart in satisfaction and discharge. [*646]

The cause was tried before POLLOCK, C. B., at the Surrey Summer assizes in 1850. It appeared that Robert Hart had been in the habit of receiving from the defendant the interest upon the 1000*l.* mentioned in the declaration; that, on the 21st of May, 1847, he received 200*l.*, in part payment of the principal sum of 1000*l.*; and that, between that day and the time of Hart's death in 1848, he had received two payments of 20*l.* each, for interest.

On the part of the plaintiff, in reply, a deed of settlement was put in, whereby it appeared that the plaintiff and Robert Hart were jointly entitled to the money, as trustees; and it was contended that a payment to one was not a payment to the trustees.

The lord chief baron, yielding to the objection, directed the jury to find for the plaintiff for the full amount claimed, with interest. The jury returned a verdict for the plaintiff, debt 1000*l.*, damages 153*l.*

J. Brown, in Michaelmas term last, pursuant to leave reserved to

him at the trial, moved to enter a verdict for the defendant on the second plea, and to reduce the damages accordingly. [JERVIS, C. J.—The plea was substantially proved,—whether it is a good plea or not, is another question. Why are trustees different from ordinary lenders?] *Wallace v. Kelsall*, 7 M. & W. 264,† 8 Dowl. P. C. 841, shows that the plea is a perfectly good one: there, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash, and a set-off of a debt due from that one to the defendant; and it was held that the plea was good, *647] without alleging any authority from the other *two plaintiffs to make the settlement. [MAULE, J.—There, the matter was on the record: here, it will be said, that, when you go into the circumstances, you find that the payment to Hart was not such a payment as must be taken to be meant by this plea.] This is not a plea of performance.

JERVIS, C. J.—You may take a rule: but it must be understood that the plaintiff is to be at liberty to argue that he is entitled to judgment *non obstante veredicto* on the second issue.

Willes now showed cause.—This is not a case within the statute of 4 Anne, c. 16, s. 12. The defendant must rest his defence upon some common law right. It was because such a plea could not be pleaded, that the statute of Anne was passed: there must have been an acquittance under seal, or the party's only remedy was by a bill in equity. [MAULE, J.—Why is not this case within the statute of Anne?] The statute gives a particular mode of pleading.(a) It enacts, that, “where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or *648] defeasance, and had been so pleaded.” This is a plea pleaded *as accord and satisfaction. [MAULE, J.—Surely it is good enough, after verdict.] It avers payment of part only. In *Worthington v. Wigley*, 3 N. C. 454, 3 Scott, 558, a plea of part payment, or the delivery of bills, in satisfaction of a bond, after the day on which the money was by the condition made payable, was held bad, on general demurrer. So, in *Marriage v. Marriage*, 1 Com. B. 761 (E. C. L. R. vol. 50), to debt on a bond in the penal sum of 4000*l.*, the condition of which bond,—after reciting that the obligor was indebted to the obligee

(a) See the forms of pleas of *solvit ad diem*, and *solvit post diem*, 3 Chitty on Pleading, 183. 7th edit.

in the sum of 2000*l.*, and that the latter had agreed to accept and take from the former interest for the same, at the rate of 5*l.* per cent. per annum, payable half-yearly, during the joint lives of the obligee and his wife, in full satisfaction and discharge of the debt, provided the same were regularly paid,—was declared to be, that, if the obligor should pay the interest in the manner stipulated, the obligation should be void, but, in case of failure in payment of all or any part of the interest, for twenty-eight days next after each payment should become due, the same having been demanded, the bond was to remain in full force; the defendant pleaded, that payment of the second half-yearly payment was not demanded by the plaintiff on the day it became due, or at any time within twenty-eight days after, but that the defendant, after the twenty-eight days, and before the commencement of the action, paid the same to the plaintiff, who accepted it in satisfaction, &c. : and it was held, on special demurrer, that this was not a good plea of *solvit post diem*, within the 4 Anne, c. 16, s. 12,—TINDAL, C. J., saying: “The statute does not authorize a payment *post diem*, unless all is paid that has become due.” [MAULE, J.—That was a *very* special case. WILLIAMS, J., referred to *Ashbee v. Pidduck*, 1 M. & W. 564,† where *a plea of payment of part of the sum mentioned in the condition of a bond, was held [649 bad, on special demurrer.] Unless the statute of Anne serves the defendant, he clearly has no defence. Payment to one of two trustees, even of the whole sum due, would not be sufficient. [MAULE, J.—One could give an acquittance.] In *Innes v. Stephenson*, 1 M. & Rob. 145, it was ruled by Lord TENTERDEN, that, where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons, without the authority of the others. *Hill v. Foley* (2 House of Lords Cases, 28), in the House of Lords,—where it was held, that the relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer’s drafts,—seems to set at rest the doubt entertained by the lord chief baron in *Pott v. Clegg*, 16 M. & W. 321, 328.† [WILLIAMS, J.—How do you get over the case of *Wallace v. Kelsall*?] *Innes v. Stephenson* was not cited there. In *Stone v. Marsh*, R. & M. 364 (E. C. L. R. vol. 2), 6 B. & C. 551 (E. C. L. R. vol. 13), 9 D. & R. 643 (E. C. L. R. vol. 22), it was held that a payment by bankers to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorized by them.

Brown, in support of his rule, was stopped by the court.

MAULE, J.(a)—There is no pretence for entering judgment *non ob-*

(a) JERVIS, C. J., was at the Court of Criminal Appeal.

stante veredicto in this case. That judgment is only given in a very clear case. The *statute of Anne is to be construed liberally; *650] more particularly, after verdict.

As to the other question, there can be no doubt that a man may pay a debt to one of several to whom he is indebted jointly. The case of bankers stands upon special grounds. Where trustees or others have a joint account with them as bankers, it is usual to require the authority of the whole to pay the money. But that arises from the peculiar contract and relation between bankers and their customers. Here, the debt might well be discharged by accord and satisfaction. I entertain no doubt whatever upon the matter.

The rest of the court concurring,

Rule absolute.

HARRIS v. PHILLIPS. Jan. 81.

Where a contract is alleged in a declaration to have been entered into for a certain time and for a certain sum, going on to allege the time and sum under a *videlicet*, it is not necessary to prove a contract for that precise time or sum.

The declaration stated that the defendant agreed to hire of the plaintiff two horses "for a certain space of time, then agreed upon between the plaintiff and defendant, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward in that behalf, to wit, 50*l.* a year for each of the said horses, payable quarterly." The contract proved, was, a hiring from week to week, at 50*l.* a year for each horse, payable weekly: Held, that the variance was immaterial, the substance of the declaration being proved; for, that the words "hire and reward" involved the time as well as the amount of the hiring, and therefore that both were covered by the *videlicet*.

THIS was an action of assumpsit. The declaration, after stating that the defendant was a grocer in the city of London, and was in the habit of sending out goods to her customers by means of a horse and cart, and that the plaintiff was a letter out of horses to draw carts, alleged, that theretofore, to wit, on the 22d of June, 1849, in consideration that the *651] plaintiff would *supply on hire to the defendant, for the purpose of drawing a cart for carrying goods to her customers, divers, to wit, two horses fit and proper for the purpose aforesaid, each of the said horses to be used on alternate working days, the defendant then promised the plaintiff to hire such horses from the plaintiff, and to keep and employ the said horses on hire, for the purpose and in manner aforesaid, for a certain space of time then agreed upon between the plaintiff and the defendant, to wit, for the space of one year thence next ensuing, and to pay the plaintiff for the use thereof certain hire and reward in that behalf, to wit, 50*l.* a year, for each of the said horses, payable quarterly, to wit, on the day and year aforesaid, and to take due and proper care of the said horses respectively, and to employ the same as aforesaid in a reasonable and proper manner during the time she, the defendant, should so have and use and employ the same under the afore-

said agreement: Averment, that the plaintiff was at all times ready and willing to supply the horses, and did supply two fit horses, according to the agreement, and that the defendant thenceforth, until her refusal any longer to use, or continue the use or hire thereof as thereafter mentioned, had the full and free use and hire thereof, &c. The declaration then alleged for breaches,—first, that, afterwards, and before the expiration of the said space of time so agreed upon as aforesaid in that behalf, to wit, on the 18th of February, 1850, the defendant wrongfully and unjustly refused any further to use, keep, or employ, and had not at any time since used, kept, or employed the said horses, or either of them, on hire or otherwise, and then wholly refused any further to perform the said agreement, and thenceforth continually had wholly prevented and discharged the plaintiff from any further performing the said agreement on his part,—secondly, that the defendant did not nor would, while the said horses were in her use and *employ under the said agreement, take due and proper care of the said horses, or use [*652 them in a reasonable and proper manner, but, after the making of the said agreement, and while she so used and employed the said horses as aforesaid under the terms of the said agreement, to wit, on the day and year first in this count aforesaid, took so little and such bad care of the said horses, and used the same in so unskilful, careless, immoderate, and unreasonable and improper a manner, that, by reason of the premises last mentioned, the said horses became and were for a long space of time sick, lame, &c., and unable to work, &c

Pleas, amongst others, non assumpsit.

At the trial, before TALFOURD, J., at the first sitting in Middlesex in the present term, the contract proved, was, a contract for the hire of the horses for a week, and so on from week to week, at the rate of 50*l.* a year, payable weekly.

On the part of the defendant, it was objected that there was a variance between the contract as laid, and the proof. The plaintiff's counsel then proposed to amend; but this the learned judge would not allow, except upon the terms of the plaintiff's paying the costs of the day,—which terms he declined to accept.

A verdict was thereupon found for the defendant upon the issue on non assumpsit, and for the plaintiff on the other issues; leave being reserved to the plaintiff to move to enter a verdict for 9*l.*, which the jury assessed as damages on the second breach.

Byles, Serjt., on a former day, obtained a rule nisi accordingly. He cited *Gladstone v. Neale*, 13 East, 410, *Crispin v. Williamson*, 8 Taunt. 107 (E. C. L. R. vol. 4), 1 J. B. Moore, 547 (E. C. L. R. vol. 4), and *Hammond v. Colls*, 1 Com. B. 916 (E. C. L. R. vol. 50).

**Humfrey* and *Bovill* now showed cause.—The question is, whether the contract alleged in the declaration is proved by show- [*653 ing a hiring for a week. The plaintiff has assigned two breaches,—one,

for dismissing the horses before the expiration of the term agreed on,—the other for not properly using the horses. To sustain the first breach, the plaintiff was bound to prove the time agreed on. All contracts must be proved as laid: and here the time was a material part of the contract. The declaration would have been bad without specifying the time. [JERVIS, C. J.—On special demurrer.] In *Preston v. Butcher*, 1 Stark. N. P. C. 3 (E. C. L. R. vol. 2), it was held that a contract for a yearly service at a specific salary, must be proved as alleged, although both the time and the sum are averred under a *videlicet*. [MAULE, J.—All that the case of *Preston v. Butcher* shows, is, that, if the declaration states a contract for a certain sum, though under a *videlicet*, the plaintiff must prove that there was an agreement for a certain sum, not that he is bound to prove the precise sum laid. WILLIAMS, J.—That is the effect of the case, as stated in *Roscoe on Evidence*, 8th edit. p. 72.] In *Edge v. Strafford*, 1 C. & J. 391,† the declaration stated, that, in consideration that the plaintiff *would* demise to the defendant furnished lodgings for a certain time, to wit, two years, the defendant promised, &c., and alleged, by way of performance, that the plaintiff did demise, &c., for the *said* term of two years: the evidence was, that the defendant agreed to take the lodging for *two or three years*: and it was held, that the consideration for the promise was not truly stated, and that the allegation of performance rendered the time stated material, notwithstanding it was laid under a *videlicet*, in setting forth the consideration.

*654] So, in *Skinner v. Andrews*, 1 Wms. Saund. 169, 1 Lev. 245, 1 Sid. 370, 2 Keb. 361, 388, it was held, that, if in debt upon bond to perform an award, to be made on or before the 16th of March, the plaintiff states that the arbitrator, before the exhibiting of the bill, *to wit*, on the 16th of March, made his award, this is a sufficient averment that the award was made on that day, and is traversable. Whenever time is of the essence of the contract, the statement of it under a *videlicet* will not relieve the party from proving it strictly as laid. In *Cooper v. Blick*, 2 Q. B. 915 (E. C. L. R. vol. 42), the declaration stated, that, in consideration that the plaintiff would enter into the defendant's employ, to wit, in the capacity of editor of a newspaper, *at and for a certain salary, to wit, at the rate of 400l. per annum*, and would continue in their service till the expiration of three months after notice to determine the contract, the defendants promised to employ him in the said capacity, at the said salary, and to continue him in the service until the expiration of three months after notice, &c., or to pay him a proportionate part of the salary for three months; but that the plaintiff had been dismissed without notice or the three months' salary. The defendants paid 37l. 10s. into court generally. On the trial, the plaintiff did not prove the contract for 400l., but relied on the payment into court as an admission of the amount. It was held, that the sum of 400l. specified as the rate of salary, not being material in itself, and being laid under

a *videlicet*, the plaintiff would not have been bound to prove it as laid, if non assumpsit had been pleaded; and therefore that the payment into court did not bind the defendants as an admission of that rate of salary. But, per PATTESON, J., that the capacity in which the plaintiff engaged to serve *was* material, and, though laid under a *videlicet*, must, on non *assumpsit, have been proved as laid, and *was* admitted by the payment into court. Here, the allegation is of a hiring for a cer- [*655
tain space of time, to wit, for one year, for certain hire and reward in that behalf, to wit, 50*l.* a year, payable quarterly. How can that be said to be proved by showing a hiring for a week or a day? [MAULE, J.—The use of the *videlicet*, is, to relieve you from strict proof of times and sums, which by the rules of pleading must be alleged with certainty.] The statement here is of a yearly hiring, and nothing more. If money had been paid into court generally upon this declaration, that would have been an admission of a yearly hiring.

Byles, Serjt., and *Charnock*, in support of the rule, were stopped by the court.

JERVIS, C. J.—I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the amount of damages assessed by the jury. The first question is, whether the times laid under a *videlicet*, and the amount of the hire and reward, are material, and so alleged that the plaintiff was bound to prove them as laid. I am of opinion that they are not. All that is necessary for the plaintiff to state in his declaration, is, in substance a contract: the declaration would be bad unless it stated a contract with certainty, both as to time and amount. He has stated it, the times and amount being alleged under a *videlicet*, in this way,—that the defendant agreed to keep and employ the horses “for a certain space of time then agreed upon between the plaintiff and defendant, to wit, for the space of one year thence next ensuing, and to pay the plaintiff for the use thereof certain hire and reward in that behalf, to wit, 50*l.* a year for each of the said horses, payable quarterly.” I think we may correctly reject everything that follows the *videlicet*; and read the declaration as alleging a contract to hire for *a certain time for certain hire and reward. That raises [*656
another question,—whether the evidence shows a certain time, which the authorities hold must be made out. I think it does; because each week is a certain time, made certain by the continuing agreement of the parties. The next question is one of more difficulty,—whether the *videlicet* applies to the words “payable quarterly,” or only to the amount of the hire: if the former be the true construction, then there is a variance; if the latter, then the evidence does show a weekly hiring, for a certain sum. I think the latter is the true construction. To satisfy the rules of pleading, the plaintiff was bound to state the amount of the hire and the time when payable. “For certain hire and reward” does, I think, involve the time and the amount agreed upon: that which

follows the *videlicet*, therefore, is but a technical expansion of the preceding allegation. Under these circumstances, it seems to me that the substance of the declaration was proved.

MAULE, J.—I agree with the lord chief justice in his application of the principles which govern this case. What those principles are, I have already, in the course of the argument, endeavoured to express.

CRESSWELL, J.—The difficulty I have felt in this case, is, as to the time of payment. The amount is clearly laid under a *videlicet*; but it might be doubtful whether the time of payment also is protected by the *videlicet*. But, on consideration, I think the words “hire and reward” do include the time as well as the amount of payment, and that what follows the *videlicet* is immaterial.

WILLIAMS, J.—I am of the same opinion. I think the case of *Cooper v. Blick* decides this case. Rule absolute accordingly.

*657] *LEVY v. MOYLAN and Others. Jan. 31.

A defendant under a peremptory undertaking to try at the first sitting in term, duly gave notice of trial, and passed the record, but, two days before the sitting day, obtained a rule for a special jury, in consequence of which the cause was passed over and made a remanet:—Held, that the plaintiff thereby broke his undertaking.

THIS was an action of trespass for an alleged false imprisonment. The defendants having in Michaelmas term, 1850, obtained judgment on demurrers which went to the whole cause of action, (a) and certain issues of fact remaining to be tried, a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice was obtained by (Tracey) one of the defendants, which rule was discharged on the 25th of November, upon a peremptory undertaking by the plaintiff to proceed to trial at the first sitting for Middlesex in the present term, viz. the 16th instant. On the fourth of January, the plaintiff accordingly delivered a notice of trial for the first sitting; and on the 14th (two days before the day of sitting) he obtained a rule for a special jury, and procured the cause to be marked in the marshal's list as a special jury, and consequently it was passed over and made a remanet. On the 22d, Tracey obtained a rule absolute for judgment as in case of a nonsuit, the plaintiff not having tried the cause pursuant to his undertaking.

S. Temple, on the 25th instant, obtained a rule calling upon Tracey to show cause why the rule of the 22d should not be discharged, and all subsequent proceedings thereon set aside, for irregularity, with costs. The affidavit upon which the motion was founded, stated that the special jury rule was not obtained for delay.

*658] *Byles, Serjt., and Ogle, now showed cause.—They submitted that the plaintiff had been guilty of a clear breach of his under-

taking, and consequently that the rule absolute for judgment as in case of a nonsuit was perfectly regular.

Temple and J. Thompson, in support of the rule.—The plaintiff complied with his undertaking by giving notice of trial and setting down the cause at the first sitting. The cause having been properly made a special jury cause, it could not possibly be tried until the sittings after term; and therefore there has been no default.

CRESSWELL, J.—The plaintiff has not complied with his undertaking. By obtaining the rule for a special jury two days only before the sitting day, he effectually prevented the trial from taking place as he had engaged that it should do.

The rest of the court concurring,

Rule discharged.(a)

(a) See *Twisden v. Stulz*, 6 Scott, 434, where it was held that the obtaining a rule for a special jury, after a peremptory undertaking, the cause being a proper one to be tried by a special jury, is not such a default as is contemplated by the statute 14 G. 2, c. 17.

***THORNE and Another v. SMITH. Jan. 16. [*659**

A. and B. gave their joint and several promissory note to C., who afterwards, by arrangement with A., received in satisfaction of that note another of the like amount from D., which was ultimately paid by E. :—Held, that these facts sustained a plea of payment by B., in an action against him by C. on the first note.

THIS was an action of assumpsit by the payees against the maker of a promissory note for 100*l.* payable on demand. The action was brought to recover a balance of 30*l.*, alleged to be due from the defendant to the plaintiffs upon the joint and several promissory note of the defendant and one Kentsh, dated the 14th of September, 1848.

The only plea was a plea of payment.

At the trial before *CRESSWELL, J.*, at the first sittings for Middlesex, in Michaelmas term last, the following facts appeared in evidence :—On the 14th of September, 1848, the plaintiffs, who were brewers, advanced Kentsh 100*l.* to enable him to take a beer-shop called The Joiners' Arms, the advance being secured by the joint and several promissory note of Kentsh and the defendant, payable on demand. Kentsh being afterwards desirous of getting rid of the house, the plaintiffs in April, 1850, introduced one Lowe to him. The business was accordingly transferred by Kentsh to Lowe, the latter undertaking to pay the 100*l.* to the plaintiffs, and for that purpose giving them his promissory note for that sum, payable on demand. Lowe afterwards assigned his interest in the premises to one Russell, who thereupon paid the amount of Lowe's note. The first-mentioned note still remained in the plaintiffs' hands: but it was distinctly sworn by Kentsh and Lowe, that the second note was given to exonerate Smith from liability upon the first.

*660] It further appeared, that, when Kentsh retired from *the business, he was indebted to the plaintiffs to the amount of 30*l.* for beer supplied to him: and they produced the note with an endorsement thereon, showing that 70*l.* had been paid on account of the note,—30*l.* out of the 100*l.* paid by Lowe having been appropriated by the plaintiffs, with the assent, as they said, of Kentsh, to the payment of the balance of his beer account.

On the part of the plaintiffs, it was submitted, that, assuming the facts proved on the part of the defendant to be true, they afforded no defence under the plea of payment.

The learned judge was of that opinion: but he left it to the jury to say whether they thought that the 100*l.* paid by Lowe was received by the plaintiffs in satisfaction of the joint and several note of Kentsh and Smith, or to be applied in discharge of Kentsh's liability generally.

The jury found that the money was paid to exonerate Smith.

A verdict was thereupon directed to be entered for the plaintiffs,—leave being reserved to the defendant to move to enter a nonsuit, or a verdict for him, if the court should think the defence established, and admissible under the plea of payment.

A rule nisi having been granted accordingly,

Collier now showed cause.—The question is, whether the facts proved amounted to payment *by the defendant*. No doubt, according to the authority of *Whitcomb v. Whiting*, 2 Dougl. 629, they might show enough to take the case out of the statute of limitations. But this is a question of pleading. There was no privity between the plaintiffs and the defendant, nor any specific appropriation at the time Russell's payment was made; nor was the note *now in question produced. *661] In *Phillips v. Warren*, 14 M. & W. 379,† it was held that payment of a bill by a third person, is not evidence of payment by the acceptor. [MAULE, J.—There, the bill was paid by one who thereby became possessed of the holder's rights. Here, the payment, in effect, is by a joint maker of the note. The note which was discharged by Russell's payment, had been given to the plaintiffs in satisfaction and discharge of Kentsh and Smith's note. Lowe's note being paid, both are paid. When the circumstances amount to payment, the proper thing is to call it payment. WILLIAMS, J.—Lowe's note was given for and on account of Kentsh and Smith's note. Payment of the former, therefore, was payment of the latter.] The mere giving a bill for and on account of a debt, is not payment: *Griffiths v. Owen*, 13 M. & W. 58;† *James v. Williams*, 13 M. & W. 828;† *Price v. Price*, 16 M. & W. 232.† The finding was in the very teeth of the evidence.(a)

(a) See *Morley v. Culverwell*, 7 M. & W. 174.† There, the drawer of a bill of exchange, before it became due, agreed with the acceptor, that, on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncanceled. It was held, that the drawer was liable on the bill, to a party to whom the acceptor

Mac Oubrey and *R. Kettle*, in support of the rule.—The payment by Russell of Lowe's note, which had been given in satisfaction of the note originally given by Kentsh and Smith, and which payment the jury found *was made for the purpose of exonerating Smith, was [*662 clearly admissible, and proved the plea. The endorsement on Kentsh and Smith's note showed an admission on the plaintiff's part of payment at all events to the extent of 70l.; and there was nothing to justify the appropriation of the remaining 30l. in the way they claimed to appropriate it. [MAULE, J.—I do not understand it to be denied on the other side that the transaction amounted to *satisfaction*: it is suggested that it should have been so pleaded, and not as *payment*.] In *Sinclair v. Baggaley*, 4 M. & W. 312,† it was suggested by ALDERSON, B., that a written paper, containing a statement of mutual accounts between a creditor and a bankrupt, by whom it was signed, and bearing date previous to the bankruptcy, showing a balance due to the creditor, was evidence of *payment*, and not of set-off, and ought to be pleaded as such. [WILLIAMS, J.—There was a plea of payment in *James v. Williams*, 13 M. & W. 828,† and the whole transaction was given in evidence under it.] This objection might have been, but was not, taken in *Smart v. Nokes*, 6 M. & G. 911 (E. C. L. R. vol. 46), 7 Scott, N. R. 786.

JERVIS, C. J.—I am of opinion that this rule must be made absolute, to enter a nonsuit. The facts are these:—The plaintiffs, being the holders of the joint and several promissory note of Kentsh and Smith for 100l., received from one Lowe a promissory note of the like amount, in satisfaction and exoneration, as the jury find,—and the learned judge is not dissatisfied with their conclusion,—of Smith's liability upon the former note; and Lowe's note is afterwards paid by Russell. It is admitted, that, if Kentsh had paid the note, that would have been a good answer under this plea. And I think *it is equally clear, that [*663 to have alleged all the facts as they occurred, would have been a mere circuitous mode of pleading payment. I think the evidence was admissible, and that a nonsuit must be entered.

MAULE, J.—I have already sufficiently intimated my opinion, in the course of the argument.

CRESSWELL, J.—I concur with the rest of the court in thinking that I was wrong in directing the verdict to be entered for the plaintiffs. I think the circumstances proved to the satisfaction of the jury, and to mine, clearly amounted to payment on account of Smith.

WILLIAMS, J., concurred.

Rule absolute, for a nonsuit.

afterwards endorsed it for value, before it became due. And it was further held, that a plea, in such an action, that the bill was *paid* by the acceptor before it became due, and afterwards re-issued by him without any new stamp, could be supported only by proof of *actual payment* in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied.

DOE d. BRABY v. ROE. *Jan. 28.*

Service of a declaration and notice in ejectment, upon one of two joint tenants, the notice being addressed to that one only, is not sufficient.

WALFORD moved for judgment against the casual ejector, upon an affidavit of personal service as to the tenants of part of the premises, and, as to one room, personal service of a declaration and notice upon one Seabrook, who with one Proctor held the same as joint tenants,—the notice being addressed to Seabrook alone.

*664] *MAULE, J.—That will not do. The notice not being addressed to both the joint-tenants, there is no service as to both: and you cannot take possession of an undivided moiety. The rule must go as to the other tenants only. Rule accordingly.

END OF HILARY TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 IN
 Hilary Vacation,

IN THE
 FOURTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

GRANT and Others v. NORWAY and Others. *Feb. 20.*

The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. *

THIS was an action upon the case by the endorsees of a bill of lading, against the owners of a vessel, to recover the amount of advances made by the former upon the bills of lading, the goods never having in fact been shipped.

The declaration stated, that, on the 17th of April, 1846, the defendants were possessed of a certain ship or vessel called the Belle, lying in the river Hooghley, at Bengal, being then bound for London, for the carriage of goods and merchandise, to be shipped on board, for freight to be therefor paid to the defendants; that thereupon the defendants gave to Messrs. Biale, Koch & Co., being merchants and traders then in credit and carrying on business in Calcutta, a bill of lading, signed by the master of the said ship, who was then and there the *servant and agent of the defendants in that behalf, and purporting to state, in the name of the said master, that Biale, Koch & Co., had shipped, in good order, in the said ship, twelve bales of silk, marked and numbered as in the margin of the said bill of lading, and that the same were to be delivered in good condition, &c., unto order or assigns, to wit, to the order of Biale, Koch & Co., he or they paying freight at

41/11/15: 89 A.Y. 429^{2N};

5l. per ton, &c.; that, in the margin of the said bill of lading were certain marks and numbers, purporting to relate to the said goods; that, by the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as a security for the payment of money, as the defendants well knew; that the defendants, by such delivery of the said bill of lading, enabled Biale, Koch & Co., to deposit the said bill of lading with other persons as a security for the payment of money, and that, in fact, Biale, Koch & Co., afterwards endorsed the said bill of lading to, and deposited the same with, the plaintiffs as a security for the payment of a large sum of money, to wit, the sum of 1684l., being the amount of an unpaid bill of exchange of which the plaintiffs, at the request of Biale, Koch & Co., then became and were the endorsees and *bond fide* holders for value, and of which Biale, Koch & Co., were the drawers, and which bill of exchange, bearing date the 18th of April, 1846, was by them the said Biale, Koch & Co., drawn upon Messrs. Johnson, Cole & Co., London, and whereby they requested the drawees, at ten months' date, to pay to them the said drawers, or order, the said sum of 1684l., and to place the same, with or without advice, to account of shipments of silk per Belle, and rice per Castle Eden, and the said Biale, Koch & Co., then endorsed the said bill of exchange to the plaintiffs; that the plaintiffs were induced by Biale, Koch & Co., to *become the endorsees and holders of the said bill of exchange, *667] and to give value for the same to the amount of 1684l., by the deposit of the said bill of lading, but for which they would not have given value nor become endorsees and holders thereof; that the plaintiffs, confiding in the truth of the said bill of lading, and believing, by reason of its contents, that the goods therein described had been and were shipped on board the said ship, deliverable under the said bill of lading to the order of Biale, Koch, & Co., consented to, and did, give value for the said bill of exchange; that, if true, the goods mentioned in the bill of lading would have been, according to the custom of merchants, deliverable to the plaintiffs as holders thereof; that the said ship sailed, and arrived in London on, &c., but did not convey or deliver the said supposed goods; that the said goods in the said bill of lading mentioned never were shipped in and upon the said ship; that the said bill of exchange was afterwards, when the same became due, duly presented for payment to the drawees, and dishonoured, and that the plaintiffs were still holders thereof for value, and unable to procure payment of the said bill of exchange, and the money for securing the payment of which the said bill of lading was so deposited, still remained due, and the plaintiffs were unable to procure payment thereof; and that, by reason of the premises, and of the misconduct of the defendants as aforesaid, the plaintiffs had lost and been deprived of the said money for the securing the payment of which the said bill of lading was so

deposited, to wit, the said sum of 1684*l.* in the said bill of exchange mentioned,—to the plaintiffs' damage, &c.

Pleas,—first, not guilty,—secondly, that the said ship was not bound, as in the declaration mentioned, for the carriage of goods, &c., for freight, &c., as in the *declaration mentioned,—thirdly, that the said bill of lading was not signed by the master of the said ship, [*668 in manner and form as in the declaration mentioned,—fourthly, that the said master was not the servant or agent of the defendants in that behalf, in manner and form as in the declaration mentioned,—fifthly, that the defendants did not enable the said persons in the declaration mentioned, to deposit the said bill of lading with other persons as a security for the payment of money, in manner and form as in the declaration alleged,—sixthly, that the defendants did not deliver to the said persons in the declaration mentioned the said bill of lading therein mentioned, in manner and form as in the declaration alleged.

Upon these pleas the plaintiffs joined issue.

At the trial, before WILDE, C. J., at the sittings at Guildhall after Trinity term, 1849, the jury found a verdict for the plaintiffs on the issues joined upon the second and third pleas: and, as to the residue of the issues, a special verdict was found, stating in substance as follows:—

- The plaintiffs, during the year 1846, and thence hitherto, had carried on business as merchants, at Calcutta, under the firm of Gladstone & Co.

During the month of April, 1846, the defendants were possessed of, and owners of, the Belle, then lying in the river Hooghley, at Calcutta, bound for London, by charter-party for the conveyance of goods for freight; Henry Tillman being the master appointed by the defendants.

On the 17th of April, in that year, Henry Tillman, being such master, and professing to act as such, signed and delivered to Biale, Koch & Co., in the declaration mentioned, being merchants and traders then in credit and carrying on business in Calcutta, a bill of lading, *in [*669 the usual form, as follows, and numbered in the margin:—

“Shipped, by the grace of God, in good order and well conditioned, upon the good ship Belle, whereof is master for this present voyage Henry Tillman, and now riding at anchor in the Hooghley, and bound for London, twelve bales of silk, numbered as in the margin, to be delivered in the like good order at London, the act of God, the Queen's enemies, &c., excepted, unto order or assigns, he or they paying freight 5*l.* per ton, &c. In witness whereof the said master hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the other two to stand void. Dated this 17th day of April, 1846. Contents unknown.

(Signed) “H. TILLMAN.”

The bill of lading was endorsed "Biale, Koch & Co."

By the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as a security for the payment of money.

By such delivery of the said bill of lading, Biale, Koch & Co. were enabled to pledge and deposit the said bill of lading with other persons as a security for the payment of money: and, on the 18th of April, 1846, the plaintiffs purchased from Biale, Koch & Co., who then endorsed and delivered to the plaintiffs for full value, the bill of exchange for 1684*l.* in the declaration mentioned, upon the terms that the payment of the amount of the bill of exchange should be secured by the deposit of the said bill of lading,—which they also endorsed to the plaintiffs, and deposited with them for that purpose.

The bill of exchange was drawn by Biale, Koch & Co., and requested the drawees to pay 1684*l.* at ten months, to the drawers, or order, and *670] to place the same, with or *without advice, to account of shipments of raw silk per Belle, and rice per Castle Eden.

The bill was accepted, payable at No. 6, Great Winchester Street, "on delivery of the shipping documents against which this bill is drawn."

The plaintiffs were induced by Biale, Koch & Co. to give value for, and to become the endorsees of, the bill of exchange, by the deposit of the bill of lading. If true, and if the goods had really been shipped, the bill of lading would have been an available security to the plaintiffs, of the value of 780*l.*, and the goods deliverable to them as holders of the bill of lading.

The vessel sailed, and arrived in London: but the goods were never shipped; and the contents of the bill of lading were untrue.

The bill of exchange, of which the plaintiffs were still holders, had been presented for payment, and was still due, and also the 1684*l.*, for securing the payment of which to the extent of 780*l.*, the bill of lading was deposited.

The goods to be shipped on board at Calcutta, were to be shipped in pursuance of a charter-party entered into in London, on the 24th of September, 1845, between the defendants and Biale, Koch & Co.; and the vessel was lying in the Hooghley, and bound for London, as before mentioned, in pursuance of the charter-party, and in the course of the voyage therein mentioned.

The case was argued in the last term, before JERVIS, C. J., CRESSWELL, J., and WILLIAMS, J.

Crowder (with whom were *Channell*, Serjt., and *Bovill*), for the plaintiffs. —The defendants are liable for the act of the master in signing bills of lading importing that goods had been shipped, and thus inducing the plaintiffs to part with their money, which but for his act they would not have

done. The master is the general *agent of the owner to conduct the business of the ship: part of that business, and a most material [*671 and responsible part, is the signing of bills of lading. In Abbott on Shipping (a) it is said: "The great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part, and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. For, if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, he is personally responsible for it; and, although the merchant may elect to sue the owners, *they* will have a remedy against him to make good the damages which they may be compelled to pay. So, if he make any particular engagement or warranty, without a sufficient authority from his owners, although the owners may be answerable to the persons with whom he contracts, by reason of the general power belonging to his situation and character, he is in like manner responsible to the owners for the injury sustained by them in consequence of his acting beyond, or in violation of, the particular authority given to him." Again, the same learned writer says: (b) "The great responsibility which the laws of commercial nations cast upon the owners for the acts of the master, has appeared to many persons, at first view, to be a great hardship: but, laying aside all consideration of the opportunities of fraud and collusion which would otherwise be afforded, it should always be remembered that the master is elected and appointed by the owners; and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and, if the merchants whom he deceives could not have redress against those who appointed him, they would often have *just reason to complain that [*672 they had sustained an irreparable injury through the negligence or mistake of the owners, as the master is seldom of ability to make good a loss of any considerable amount." Thus, all the dealings and the misdeeds of the master, while acting in that capacity, are cast by law upon his owners. Pothier lays it down, (c) that, "when a merchant has appointed any person to the management of a commercial concern, or to the command of a vessel, and, in like manner, when the farmers of the King's revenue have appointed any person to the direction of a particular department; in all the engagements which such manager contracts for the affairs committed to his charge, although he contracts in his own name, he obliges himself as principal, and, at the same time, he obliges his employer as an accessory debtor; for the employer is considered as having consented beforehand, by the commission which he has given, to all the engagements which the manager might contract for the business to which he was appointed, and to have rendered himself an-

(a) Part II. Ch. IV. § 1, 8th edit. p. 167.

(b) Part II. Ch. II., § 5.

(c) Evans's Translation of the Treatise on Obligations or Contracts, Vol. I. part II. c. 6, art. II. § 1, p. 300.

swerable for them." So, in Story on Agency, 3d edit. ch. vi. § 116, p. 133, it is said: "The master of a ship has various incidental powers, resulting from his official capacity, which have been long recognised in the maritime law, and are not now open to judicial controversy. Thus, for example, he has an incidental authority to make all contracts belonging to the ordinary employment of the ship; as, for example, to let the ship on a charter-party, and to take shipments on freight, if such is the usual employment of the ship, but not otherwise; to hire seamen for the voyage; to contract for necessary repairs and equipments for the voyage; and to hypothecate the ship in foreign ports for moneys advanced to supply the *necessities of the ship, if they cannot otherwise be supplied. In these cases, and in others of the like nature, he often enters (as he may well do) into the contracts in his own name; and he may thus become personally liable, as well as his principal, to fulfil the same; for, he is treated, not as an ordinary agent, but as, in some sort, and to some extent, clothed with the character of a special employer or owner of the ship, and representing, not merely the absolute owner (*dominus navis*), but also the temporary owner, or charterer for the voyage (*exercitor navis*). In short, our law treats him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it as a servant. On this account, he may bring an action of trespass for a violation of that possession; and, where the freight has been earned under a contract to which he is a party, or under a bill of lading signed by himself, he may bring a suit for the freight due on the delivery of the goods." Again, in § 119, it is said: "The master is ordinarily intrusted with the authority of shipping the officers and crew; of superintending the ordinary outfits, equipments, repairs, and other preparations of the vessel for the voyage; of lading and unlading the cargo; and, in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading for the same. These are such usual incidents of his official character, that notice of a positive prohibition would seem indispensable, in order to affect third persons with his want of due authority to do the acts." And in § 127, he further says: "If a person is held out to third persons, or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that *674] authority; and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases, good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for, he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he who, without

intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him." [JERVIS, C. J.—If the master's authority is to sign bills of lading only upon receiving the goods on board, the owner does not hold him out as his agent until he receives the goods. CRESSWELL, J.—If, as you say, the authority of the master is not a special authority, but a general authority which is conferred upon him by law, the extent of that authority must be known to all persons who take bills of lading.] It is not contended that the master has a general authority to give bills of lading without receiving the goods. [CRESSWELL, J.—Here, the apparent authority of the master seems to have been more limited than his real authority.] The negotiability of bills of lading has long since been established: *Lickbarrow v. Mason*, 2 T. R. 68. [JERVIS, C. J.—In that case, BULLER, J., intimates, that, in a case like the present, the master would be liable. "A bill of lading," he says, "is an acknowledgment by the captain of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received the goods on board; and *the consignee would be entitled to his action against the captain for the fraud.*"] It would be hard indeed upon the endorsee of the bill of lading, who has no means of knowing *whether the master has received the goods, but takes it upon the faith of his signature, to hold that he has no remedy against [*675 the owner. Such a doctrine will go very far to destroy the negotiability of these instruments. If the owner's authority to the master is limited to goods actually received on board, the owner would not be responsible for *any* wrongful act by the master. Suppose the master receives six bales of silk, and signs a bill of lading for twelve,—is the owner responsible for the six, and not for the others? [JERVIS, C. J.—That is the very point which we have before us.] In *Howard v. Tucker*, 1 B. & Ad. 712 (E. C. L. R. vol. 20), goods being shipped in India for London, on account of a person there, the bill of lading was forwarded to him, and he endorsed it over for value: the bill of lading, signed by the captain, stated the freight to have been paid in Bengal, but it was found, after the above transfer, that the freight had never been paid, through the default of the shippers: it was held, that the ship-owners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. In giving judgment, the court say: "The point contended for, is, that an owner having given a bill of lading, by which freight appears to have been paid before the ship's departure from India, is still not estopped, as against the assignee of such bill, from claiming freight when the vessel arrives here. We think such a position cannot be supported, and that, if we were to sanction it, a door would be opened to many frauds." It is impossible to distinguish that case in principle from the present, without drawing some such line as that suggested by

the lord chief justice, viz., that the master is only the agent of the owner to sign bills of lading *when he receives the goods*,—a position for which, it is submitted, there is no authority. In *Berkley v. Watling*, 7 Ad. & *676] E. 29 (E. C. L. R. vol. 84) 2 N. & P. 178, a declaration *in assumptionis stated that the defendants Watling and Nave were owners of a ship; that, in consideration that the plaintiff at their request shipped goods on board to be delivered to him, Watling and Nave promised to deliver; assigning for breach, non-delivery. Nave pleaded separately, and traversed the shipment. On the trial, the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by Watling, stating the goods to be shipped by Watling, to be delivered to the plaintiff or his assigns. Proof also was given to show that the plaintiff held the bill for value. Watling was the managing owner. It was held, that Nave might produce evidence that the goods were not shipped in fact, and was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as the plaintiff could support his issue only by making Watling his agent, and, if Watling was so, the plaintiff was cognisant, through him, of the fact. [JERVIS, C. J.—The point now under discussion was incidentally mentioned by LITLEDAL, J., and my brother PATTESON, in that case.] *Bates v. Todd*, 1 M. & Rob. 106, shows that a bill of lading is not conclusive as between the shippers of the goods and the owners of the ship; but that the owners may show that less goods than those specified in the bill of lading were shipped, the master, who signed the bill of lading, being misled by the fraud of the agent of the shippers. In *Ewbank v. Nutting*, 7 Com. B. 797 (E. C. L. R. vol. 62), it was held that trover lies against a ship-owner for a sale by the master, of goods, at a place short of their port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner. The effect of a bill of lading was a good deal considered in the case of *Jenkyns v. *Usborne*, 7 M. & G. 678 (E. C. L. R. vol. 49), 8 Scott, *677] N. R. 505. TINDAL, C. J., there says: (a) “The actual holder of an endorsed bill of lading may undoubtedly by endorsement transfer a greater right than he himself has. It is at variance with the general principles of law, that a man should be allowed to transfer to another a right which he himself has not: but the exception is founded on the nature of the instrument in question, which, being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself which is the symbol of the property itself.” [WILLIAMS, J.—The authority of

that case is, merely to deny to a delivery order the qualities which are *stated* to belong to a bill of lading.] The negotiability of a bill of lading is certainly more restricted than that of a bill of exchange. [CRESSWELL, J.—The proper phrase is, that the property in the goods passes by endorsement of the bill of lading: *Thompson v. Dominy*, 14 M. & W. 403.†] Take the ordinary case of an authority to draw, accept, or endorse bills of exchange. In *Boulton v. Arlson*, 3 Salk. 234, 1 Ld. Raym. 224, it was held “that a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master’s use.” [CRESSWELL, J.—That means, rather, the allowing an apprentice to acknowledge the receipt of money.] In *Prescott v. Flinn*, 9 Bingh. 19 (E. C. L. R. vol. 23), 2 M. & Scott, 18 (E. C. L. R. vol. 28), from the fact that the defendants’ confidential clerk had been accustomed to draw checks for them, that, in one *instance, at least, they had authorized him to endorse, [*678 and, in two other instances, had received money obtained by his endorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to endorse. The general doctrine is also considered in *Llewellyn v. Winckworth*, 13 M. & W. 598,† and *Alexander v. Mackenzie*, 6 Com. B. 766 (E. C. L. R. vol. 60). [CRESSWELL, J.—The distinction between that class of cases and this, is, that, where a clerk or other person accepts or endorses for his employers, if he is acting within the scope of his authority, the employers are in the same position as if they had themselves accepted or endorsed.] The master of a ship, assuming that he has special directions from his owners as to the form of the bills of lading, being clothed with an apparent authority as master, which enables him to impose upon third persons, his owners are clearly responsible for his acts,—whether of negligence or of fraud. In *Hern v. Nichols*, 1 Salk. 289, in an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for — silk, whereas it was another kind of silk, and that the defendant, well knowing this deceit, sold it to him for — silk: on the trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was his factor beyond sea; and the doubt was, if this deceit could charge the merchant. But HOLT, C. J., was of opinion “that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.” [CRESSWELL, J.—There the factor entered into a contract with the plaintiff for his employer. Here, you are a step further off. You say,—*your agent, with whom I made no contract, has enabled a man [*679 with whom I did contract, to cheat me.] This is a question between a stranger and a man in whom the defendants put their confidence and trust. In *Pickering v. Busk*, 15 East, 38, where a purchaser of

hemp lying at wharfs in London, had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp,—this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. *Whitehead v. Tuckett*, 15 East, 400, is to the same effect. The general principle pervading all these cases, is, that he who places a man in a position which enables him, acting as his general agent, to obtain a false credit, is himself liable. [CRESSWELL, J.—Suppose this were not the case of an endorsee of a bill of lading, but that of the owner of the goods, who really sent them by a carrier for the purpose of their being shipped, and the master gives a receipt to the owner of the goods, but the carrier fails to deliver them: in that case, the owner would be induced by the captain's receipt to abstain from pursuing the thief: but, is the endorsee of the bill of lading, under the circumstances supposed, in the same position as the original owner of the goods?] He certainly is not in a worse position. The true principle upon which the decision of this case will turn, is that put by Lord DENMAN, in *Trueman v. Loder*, 11 Ad. & E. 589, 593 (E. C. L. R. vol. 39), 8 P. & D. 267. “Here,” says his lordship, “is the case of one exclusively an agent for another, and in that light only regarded by the customer. Having full authority so to represent himself, he forms the design in his own mind, to divert one of his numerous contracts from its expected destination, to some purpose *of his own. *680] But that design cannot operate to oust the opposite party of those rights against the principal which both the principal and agent had by their conduct concurred in persuading him that he possessed.” Here, the captain has an unlimited authority to sign bills of lading for goods received. If he exceeds his authority, or deceives third persons, it is but just that the owner should be responsible.

Butt (with whom was *Cleasby*), contra.—Upon the facts stated in this special verdict, the defendants are clearly not liable to the plaintiffs for the consequences of the master's improvident act in signing bills of lading when he had not actually received the goods on board. The master of a ship is not, as is contended on the other side, the general agent of his owners. He is their agent only to a special and limited extent. His authority is to be gathered from the nature of his employment. He is to receive goods on board the ship, to give bills of lading for goods so received, to make contracts for freight, and to take due and proper care of the goods whilst on board. It is not his duty, neither has he any authority, to sign bills of lading for goods which have never been shipped. In no case is a principal bound by the acts of his agent not within the scope of his authority. Story, in his treatise on the Law of Agency, after speaking of the liability of the principal for tort or negligence of the agent, says, in § 456, “But, although the principal is thus

liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency: for the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit." [CRESSWELL, J.—Mr. Crowder says, *true it is that it is well known that the captain's *real* authority, [*681 is, to sign bills of lading only for goods that are actually put on board the ship: but, he says, there is an *apparent* authority to sign all bills of lading without restriction. Try that by the test of a partner's authority to sign bills of exchange for the purpose of the trade. One draws or accepts a bill in fraud of his partner,—what answer does this afford to a *bonâ fide* holder for value?] The similitude between bills of lading and bills of exchange, is not very perfect: if they were in all respects analogous, the argument on the other side would be much more formidable. But there is a manifest distinction between cases of contract and tort: the endorsement of a bill of exchange transfers the contract; not so the endorsement of a bill of lading; the contract between the shipper and the owner remains unassignable. In Story on Agency, § 119, it is said the master is ordinarily intrusted with the authority, "in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading *for the same*." Most of the authorities are collected in the case of *Wilde v. Gibson*, 1 House of Lords Cases, 605, where the House of Lords resolved, amongst other points, that, to set aside a purchase, perfected by conveyance and payment of the purchase-money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient, there must be proof of direct personal knowledge and concealment by the principal. Lord CAMPBELL, in the course of the argument of that case, observes: (a) "In an action upon contract, the representation of an agent is the representation of the principal; but, in an action on the case, for deceit, the misrepresentation or *concealment [*682 must be proved against the principal." And in giving his judgment, his lordship further enlarges upon that distinction. (b) *Howard v. Tucker*, 1 B. & Ad. 712 (E. C. L. R. vol. 20), is distinguishable from this case. There, the captain received the goods, and signed a bill of lading purporting that freight had been paid in Bengal,—which he clearly had authority to do. That being so, it was not competent to the owner to detain the goods, as against the assignee of the bill of lading, for freight. [CRESSWELL, J.—Had the captain authority to give a bill of lading acknowledging that freight had been paid, when in fact it had not? JERVIS, C. J.—The case of *Howard v. Tucker* does not seem to have undergone much discussion.] In *Ewbank v. Nutting*, 7 Com. B.

(a) 1 House of Lords Cases, 615.

(b) Ib. 633.

797 (E. C. L. R. vol. 62), the goods were sold by the captain without necessity : there could be no doubt, therefore, that the owner was liable. The extent of the liability of the principal for the acts of his agent, is much discussed in *Cornfoot v. Fowke*, 6 M. & W. 858,† *Fuller v. Wilson*, 3 Q. B. 58, 1009 (E. C. L. R. vol. 43), 2 Gale & D. 460, 3 Gale & D. 570, *Moens v. Heyworth*, 10 M. & W. 147,† *Taylor v. Ashton*, 11 M. & W. 401,† and *Evans v. Collins*, 5 Q. B. 804, 820 (E. C. L. R. vol. 48), Dav. & Meriv. 72, 669,—all of which cases are commented upon in the notes to *Pasley v. Freeman*, in *Smith's Leading Cases*, Vol. II. pp. 70—71 b. In *Jarman v. Hooper*, 6 M. & G. 827 (E. C. L. R. vol. 46), 7 Scott, N. R. 663, in trespass *quare domum fregit* against the sheriff and A., the sheriff justified under a *fi. fa. issued against the goods of the plaintiff* by A. : to this plea the plaintiff replied, that the *fi. fa. did not issue against the goods of the plaintiff*. It appeared that A. had obtained judgment against Joseph Jarman, who was the son of the plaintiff, and thereupon issued a *fi. fa.* against Joseph Jarman, *683] Jarman the elder were taken : and it was held, that the writ afforded no justification to the sheriff ; and that A. was also liable in trespass, notwithstanding he was not proved to have in any way interfered, beyond giving instructions to the attorney to sue Joseph Jarman, the son. In giving the judgment of the court in that case, TINDAL, C. J., says : (a) “ As to the defendant Heenan, the only question in his case is, whether he is bound by the act of his attorney, in giving the directions to the sheriff to take the goods of the plaintiff. That the plaintiff in the original action is liable in trespass, if the sheriff by his own order takes the goods of a stranger in execution, is clear law,—2 Roll. Abr. 553, 1, 5, 10. And it appears to us that the direction given by the attorney is a direction given by an agent within the scope of his authority, and binds the principal. The attorney has the general conduct of the cause ; he is the only person with whom the sheriff has communication : and, in taking a step essentially necessary for the benefit of the client, that is, for the obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority, though he has miscarried in its execution. And, when it is argued that he cannot be his agent in giving *false* information, the answer is, that, if his agent to do the particular act, the client must stand to the consequences if he acts inadvertently or ignorantly.” Here, however, the captain was *not* acting within the scope of his authority in signing bills of lading for goods which he had never received : the act done by him was as distinct from his authority as if he had committed an assault or any other crime. That the consignee could acquire no property in the goods under a bill of lading so signed, is clear from the cases of *Osey v. Gardner*, Holt,

(a) 6 M. & G. 849 (E. C. L. R. vol. 46), 7 Scott, N. R., 680.

N. P. C. 405 (E. C. L. R. vol. 8), and Begbie *v.* Clarke, Cooke & Alcock, 150 (Irish). The transaction was there treated as a mere fraud. In no case is the master or the principal responsible for the act of his servant or agent, where the act done is not done fairly within the scope of the authority conferred upon him: *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590 (E. C. L. R. vol. 6); *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343;† *Wigmore v. Jay*, 5 Exch. 354.† With respect to the suggestion that the owner, who appoints the captain, thereby places him in a position to impose upon the world,—the obvious answer is, that he appoints him in the expectation that he will do his duty, and nothing else.

Crowder, in reply.—The master of a ship is especially classed amongst those who are said to be general agents: his authority is not limited; and, from the very nature of his duties, he must often act upon his own discretion. In *Smith's Mercantile Law*, in treating of the authority of an agent to bind his principal to third persons, the learned author says: (a) "In solving all questions on this subject, the general rule is, that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment; for he who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons, in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not; since, where one of two innocent persons must suffer by the fraud of a third, he who enables that third person to commit the fraud should be the sufferer." Again, (b)—"A general agent is a person *whom a man puts in his place to transact all his business of a particular kind: thus, a man usually retains a *factor* to buy and sell all goods, and a *broker* to negotiate all contracts of a certain description, an *attorney* to transact all his legal business, a *master* to perform all things relating to the usual employment of his ship, and so in other instances." It is difficult to conceive a man acting more apparently within the scope of his authority, than a master in giving bills of lading. It is true, his real authority and duty are, to sign bills of lading only upon receiving the goods: but he is still acting within the scope of his authority, if he, whether fraudulently or mistakenly, signs bills of lading before the goods are sent on board. Lord CAMPBELL's dictum in *Wilde v. Gibson*, as a general proposition, is not accurate: it is inconsistent with Lord HOLT's doctrine in *Boulton v. Arlson*, 3 Salk. 234, 1 Lord Raym. 224, and with that of PARKE, B., in *Cornfoot v. Fowke*, 6 M. & W. 358.† There are many cases where the principal is responsible for the misconduct of his agent. Thus, in *Ellis v. Turner*, 8 T. R. 531, the owners of vessels on the navigation between

(a) 4th edit. p. 116.

(b) Page 118.

Hull and Gainsborough had given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10l. per cent. unless extra freight were paid. The master of one of the ships took on board the plaintiff's goods, to be carried from Hull to Stockwith (an intermediate place between Hull and Gainsborough), and delivered at Stockwith. The vessel passed by Stockwith without delivering the plaintiff's goods there, and sunk before her arrival at Gainsborough, without any want of care in the master: and it was held, that the owner *686] of the vessel was responsible to the plaintiff for the whole loss, *in an action on the contract. Lord KENYON said: "Perhaps, as between the defendants and their servant, the master of the vessel, this was misconduct in the latter; but, as between the defendants and third persons, the former are answerable upon their contract. The maxim applies here, *respondet superior*." So here, as between the master and the owners, the former may have been guilty of a breach of duty; but still *they* are responsible to innocent third parties. After stating the facts of that case, his lordship proceeds: "As the vessel reached Stockwith in safety, and might have delivered the plaintiff's goods there, I think that this action may be maintained; for, though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as, if he were to commit an assault upon a third person in the course of his voyage." *Jarmain v. Hooper*, 6 M. & G. 827 (E. C. L. R. vol. 46), 7 Scott, N. R. 663, is also a distinct authority in favour of the liability of the principal for the act, though not strictly authorized, of the agent. *Osey v. Gardner*, Holt, N. P. C. 405 (E. C. L. R. vol. 3), and *Begbie v. Clarke, Cooke & Alcock*, 150, have no application whatever to the present case. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court.

This case was argued before my brothers CRESSWELL and WILLIAMS and myself. It arises upon a special verdict, and presents a question of *687] considerable importance, both to those who take bills of lading on the faith of their representing property which passes by the transfer of them, and to the ship-owner, whom it is attempted to bind by all bills of lading which his captain may think fit to sign. The point presented by the several pleas is substantially one and the same, viz. whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to

several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign ports, and, under certain circumstances, at home, for necessary disbursements, and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and, if a more limited one is given, a party not informed of it is not affected by such limitation. "The master is a *general agent* to perform all things relating to the usual employment of his ship: and the authority of such an agent to perform all things *usual in the line of business in which he is employed*, cannot be limited by any private order or direction not known to the party dealing with him." (a)

*Is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for, all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until goods are on board; for, it begins by describing them as *shipped*. It was not contended that such a course is usual. In *Lickbarrow v. Mason*, BULLER, J., says: (b) "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship: therefore, it would be a fraud in the captain to sign such a bill of lading, if he had not received the goods on board; and the consignee would be entitled to his action against the captain for the fraud."

It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped: nor can we discover any ground upon which a party taking a bill of lading by endorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

If, then, from the usage of trade, and the general practice of ship-masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or endorsed *per procuration*, when no such agency existed; *Alexander v. Mackenzie*, 6

(a) *Smith's Mercantile Law*, p. 59.

(b) 2 T. R. 75.

*689] Com. B. 766 (E. C. L. R. vol. 60). The *words "*per procuration*" give notice to all persons that the agent is acting under a special and limited authority; and therefore the party taking such a bill has to establish the existence of the authority; it is not enough to show that other bills similarly accepted or endorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people that the authority of the captain to give bills of lading, is limited to such goods as have been put on board; and a party taking a bill of lading, either originally, or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it.

There is little to be found in the books on this subject. It was discussed in *Berkley v. Watling*, 7 Ad. & E. 29 (E. C. L. R. vol. 84), 2 N. & P. 178. That case was decided on another point: but LITLEDALK, J., stated, that, in his opinion, a bill of lading is not conclusive upon the ship-owner.

For these reasons, we are of opinion that the issues should be entered for the defendants, and that the defendants are entitled to judgment.

Judgment for the defendants.

*690] *GERALOPULO v. WIELER. Feb. 20.

Where a foreign bill is paid *supra* protest, for the honour of an endorser, the bill must be protested for non-payment before the payment for honour is made; but the formal instrument of protest may be drawn up, or extended, at any time afterwards,—even after the commencement of an action by the person so paying against the endorser for whose honour the payment was made.

Where, therefore, a bill had been duly paid *supra* protest, and a formal protest transmitted abroad to the party for whose honour the payment was made,—*Quære* whether secondary evidence of the protest was admissible?

But, held, that a formal protest extended by the notary from his book, after the commencement of the action, but bearing date the day of actual protest, was *primary* evidence of the payment *supra* protest.

THIS was an action of assumpsit on two foreign bills of exchange.

The first count of the declaration stated, that, on the 7th of August, 1849 (old style), one Jean Petcheniff, at Odessa, in Russia, drew a bill of exchange on the defendant for 260*l.*, payable, three months after date, to the order of Messrs. Buba, Frères; that the defendant accepted the bill; that Buba, Frères, endorsed it to Signori Fratelli Buba, di Moscow, who endorsed it to Giles Loder, who endorsed to the London and Westminster Bank, by whom it was presented, at maturity, viz., on the 10th of December, 1849, for payment; that payment was refused, and the bill protested for non-payment on the said 10th of December, 1849; that, on the 11th of December, 1849, the plaintiff appeared before a notary

public, and declared that he would pay the bill, under protest, for the honour of Signori Fratelli Buba, the second endorsers; and that he paid it accordingly.

There was a second count, in similar terms, on another bill for 220*l*.

The defendant pleaded to each count,—first, that he did not accept the bill,—secondly, that the bill was not duly protested for non-payment, in manner and form as in the declaration alleged,—thirdly, that the plaintiff did not pay the bill *supra* protest, as alleged,—fourthly, that *the defendant had not notice of such protest for non-pay- [*691
ment as alleged.

Upon these pleas respectively the plaintiff joined issue.

The cause was tried before MAULE, J., at the sittings in London after Trinity term, 1850. It appeared that the bills had been duly presented for payment, and were dishonoured; that they were handed, on the 10th of December, 1849, to one Comerford, a notary, to be protested, and were on that day duly protested for non-payment; that, on the 11th, the bills were paid, through Comerford, by the plaintiff, under protest, for the honour of Signori Fratelli Buba, the second endorsers; and that protests were regularly drawn up, and forwarded by post to Signori Fratelli Buba on the same day.

These documents being out of the jurisdiction of the court, it was proposed, on the part of the plaintiff, to give secondary evidence of their contents, from the notary's book. This was objected to on the part of the defendant; and *Boosey v. Davidson*, 13 Q. B. 257 (E. C. L. R. vol. 66), was cited. The learned judge, however, received it.

The plaintiff further produced duplicate protests, which had been drawn up respectively by the notary in March and April last, *after the commencement of this action*, from the entries made in his book at the time the transactions occurred.

For the defendant, it was insisted, that, though, under ordinary circumstances, the formal instrument of protest may be drawn up, or extended, at any time before action, or, possibly, before trial, at all events, that could not be done in the case of a payment *supra* protest for the honour of an endorser, the rights of third persons then intervening; but that, in such case, the protest *must be regularly [*692
extended before the payment for honour is made.

The evidence was received, and a verdict found for the plaintiff, damages 495*l*. 14*s*.; leave being reserved to the defendant to move to enter a nonsuit, or a verdict for him, if the court should be of opinion that the protests were not well proved.

Byles, Serjt., in Michaelmas term last, obtained a rule nisi accordingly. He cited *Vandewall v. Tyrrell*, M. & M. 87 (E. C. L. R. vol. 22), and *Nouguier*, vol. I. p. 346.

Channell, Serjt., and *Bovill*, in the course of the last term, showed cause.—1. The principal question is, whether, where payment of a bill

of exchange is made *supra* protest, for the honour of an endorser, the formal protest may be extended after the time of actual protest. It is submitted that it may. The authority which will mainly be relied on, on the part of the defendant, is the *nisi prius* case of *Vandewall v. Tyrrell*. When, however, the facts of that case come to be investigated, and minutely considered, it will be found not to go the length contended for here: it merely decides that a party to a bill of exchange is not liable for money paid to his use by a person who takes up the bill for his honour, *unless formal protest of payment to his honour be made* before payment of the bill. The action was assumpsit for money paid by the plaintiffs to the use of the defendant. The facts were these:—The defendant, who resided in Jamaica, drew four bills, dated the 9th of September, 1824, for 1500*l.*, on Wallis & Co., in London, at nine months after sight. The bills were duly accepted, but were dishonoured, and noted for non-payment at the time they became due, viz., on the 30th *693] of July, 1825. The plaintiffs, on the request of the acceptors, paid the bills for the honour of the drawer, on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May, 1826, the notary public was instructed to protest the bill for non-payment; which he did. The protest purported to have been made before the payment, and in form asserted that the “plaintiffs were ready to pay for the honour of the drawer.” The notary stated the custom to be, to protest formally before payment. Lord TENTERDEN said: “The plaintiffs must be nonsuited: they sue upon the custom of merchants; that custom clearly is, that a formal protest should be made before payment is made for the honour of any party to the bill.” Here, the protest was formally made, and everything completed, before the payment for honour. In Buller’s *Nisi Prius*, p. 272, it is said: “The use of noting, is, that it should be done the very day of refusal; and the protest may be drawn any day after by the notary, and be dated of the day the noting was made: *Goostrey v. Mead*, at Westminster, 1751. *Orr v. Maginnis*, 7 East, 359, 3 J. P. Smith, 328, has been erroneously supposed to qualify *Goostrey v. Mead*: but it has, in truth, no bearing whatever upon the question. In Selwyn’s *Nisi Prius*, 10th edit., p. 359, the law upon the subject of protest is thus laid down:—“In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest it for non-payment: but, where there has been a promise of payment after the bill became due, such promise supersedes the necessity of proving either presentment for payment,(a) notice of dishonour, or protest.(b) But, where the drawer of a foreign bill of *694] exchange, at the time of the drawing, was in a foreign *country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer’s house, held that this was sufficient.(c)

(a) *Greenway v. Hindley*, 4 Campb. 52.(b) *Gibbon v. Coggon*, 2 Campb. 183.(c) *Robins v. Gibson*, 1 M. & Selw. 288.

Where drawer was resident abroad, it was holden (a) sufficient to inform him that the bill had been protested for non-payment, without sending him a copy of the protest. It appears from a passage extracted from the case of *Tassell v. Lewis*, 1 Lord Raym. 748, that this protest ought to be made on the last day of grace. (b) This strictness, however, is not observed in practice. The modern usage is, for the notary to make a minute on the bill, consisting of his initial, the day, month, and year when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary, having made his minute, *draws up the protest at his leisure*. In Buller's *Nisi Prius*, p. 272, it is said, 'that the use of noting, is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated on the day the noting was made.' The practice certainly is as here stated: but, in *Chaters v. Bell*, 4 Esp. N. P. C. 48, a question was raised whether a protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended that the mere noting the bill on that day, and drawing the protest on a subsequent day, was insufficient. Lord KENYON was of opinion that it was sufficient; and, a new trial having been granted, Lord ELLENBOROUGH agreed in opinion with Lord KENYON. A case was then reserved for the *opinion of the court, [*695 and, after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But, the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again." In *Chitty on Bills*, 9th edit. p. 464, it is said: "It has been held that the protest for non-acceptance or non-payment may be drawn up at any time before the trial, provided the bill be noted in due time." So, in *Bayley on Bills*, 6th edit., p. 262, it is said, that, "in the case of a foreign bill, to give effect to the notice, it is necessary that a minute of the non-acceptance or non-payment, and a solemn declaration on the part of the holder against any loss to be sustained thereby (which minute and declaration is called a protest), should be made out by a notary public." Again: (c) "A foreign bill should be noted for non-acceptance or non-payment on the day on which acceptance or payment is refused. But it would seem that the protest may be formally drawn up at any future period, provided that, in the event of a suit, it be drawn up before the commencement of such suit. Before also a person pays the bill for the honour of any party to it, a formal protest should be drawn up." (d) And at p. 490, reference is made to an Anonymous case, 12 Mod. 845,

(a) *Goodman v. Harvey*, 4 Ad. & E. 870 (E. C. L. R. vol. 31), 6 N. & M. 372.

(b) "With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace." Per BULLER, J., in *Leftley v. Mills*, 4 T. R. 174.

(c) Page 269, citing *Leftley v. Mills*, 4 T. R. 170, 174, and *Chaters v. Bell*, 4 Esp. N. P. C. 48.

(d) Citing *Vandewall v. Tyrrell*, M. & M. 87 (E. C. L. R. vol. 22).

where, "to prove protest, the plaintiff produced an instrument attested by a notary public; and, though it was insisted that he should prove this instrument, or at least give some account how he came by it, *HOLT, C. J.*, ruled that it was not necessary." In *Brain v. Preece*, 11 M. & *696] W. 773,† Lord ABINGER says: "The way to *prove the noting, is, to prove the protest; and, although the notary is very often called to prove his protest, I am not aware that it is necessary; for, supposing the clerk were dead, still I think the protest would be sufficient evidence. It is like any other case of a public officer who does anything in the course of business."

2. Where a document is properly beyond the jurisdiction of the court, secondary evidence of its contents is admissible. In *Prince v. Blackburn*, 2 East, 250, it was held, that, if a subscribing witness to a deed be abroad, out of the jurisdiction of the court, and not amenable to its process at the time of the trial, evidence of his handwriting is admissible; though it do not appear whether he be domiciled or settled abroad. The like was ruled in *Glubb v. Edwards*, 2 M. & Rob. 300. [CRESWELL, J.—It is not on the ground that his is the *best* evidence, that the attesting witness, if procurable, must be called; but because he is the witness agreed upon between the parties.] If a document be lost or mislaid, there is no imperative rule requiring its production: it is in each case for the judge to say whether the excuse offered for its absence is sufficient. [WILLIAMS, J.—If a man makes an admission which is against his interest, and he is dead, you may give such admission in evidence. But does that rule apply to the case of a man who is abroad?] That case may present some difficulty. Here, we have the best evidence which is attainable by the process of the court. The case of *Boosey v. Davidson* is altogether beside the question. [JERVIS, C. J.—I once cited that case in the Exchequer; but I did not find it treated with much respect.]

Byles, Serjt., in support of his rule.—The case of *Vandewall v. Tyrrell* is as strong an authority as a *nisi prius* case can be: and the *697] doctrine there laid down is *in strict accordance with the laws of Scotland and of France, and, indeed, of the whole of continental Europe. It may be at once conceded that the protest may be drawn up or extended at any time, where there is no acceptance or payment for the honour of a party to the bill: but, where the acceptance or the payment is for honour, it must be drawn up *before* acceptance or payment; otherwise, the party paying for honour becomes a mere endorsee. In *Beawes's Lex Mercatoria*, p. 568, pl. 34, it is said: "When a bill is made payable to order, and endorsed by a substantial man, before acceptance be demanded, and the acceptor scruples to accept it for account of the drawer, or for the account of him it is drawn for, he may, if he thinks proper, do it *suprà* protest for the honour of the endorser; and, in this case, he must first have a formal protest made for non-acceptance,

and should send it without delay to the said endorser for whose honour and account he hath accepted the bill." And at p. 571, pl. 66, the author further says: "In case of a person's refusing payment of his accepted bills when due, they ought to be protested, and sent *with the protest* to the remitter or drawer." Marius, in his "Advice concerning Bills of Exchange," pl. 87, 126, 127, lays down the law in similar terms. "Moreover," he says, "if a bill of exchange be drawn on John A., and he refuse to accept it: or, if John A. be out of town, and have left no legal order for acceptance thereof, by letter of attorney under his hand and seal, in due form; and that William C. (a friend of the drawer's) will accept the bill for honour of the drawer: in either of these cases, the party to whom the bill is payable, or his assigns, ought *in the first place* to cause protest to be made for non-acceptance by John A., and *then* he may take the acceptance of William C. for honour of the drawer; for, otherwise the drawer may allege that he did not draw the bill on William C., but on John A.; and *therefore, according to the custom of merchants, diligence ought to be first used towards [698 John A., and by protest legally to prove his want of acceptance: or else order and commission is broken, and so the damage which may happen for want of having the acceptance of John A. (or his refusal, for not having given order), will be put upon him who had the bill sent unto him to be gotten accepted; for, you ought to respect your friend's good as your own." Pl. 126. "If a bill of exchange be subscribed or drawn by Abraham F. on Benjamin G., for the account of Charles H., and it so happen that Benjamin G., to whom the bill is directed, will not accept the bill for account of Charles H., as it is drawn, but would willingly accept it for the account of Abraham F., being a special friend to Benjamin G. on whom it is drawn, and so this Benjamin G. is very unwilling to suffer the bill to go back by protest for non-acceptance, and therefore he desires to accept it for honour of the drawer, and for his account: in this case (according to the law of merchants) Benjamin G. may so accept the same; but, *before he do accept the bill*, he must personally appear before a notary public, and declare before him such his intent, and the notary must make *an act thereof, in due form*, to be sent away by Benjamin G. to Abraham F., so that he may have speedy advice thereof; and the act being entered, then he may accept the bill for the honour of the drawer, and for his own account. And, when the bill is due, he must cause a like act to be made for payment, *before he pay the bill*, declaring that he will pay it for honour of the drawer, and for his account, but not for account of Charles H., for whose account it was drawn: and thus (Benjamin G. giving honour to the bill, although he do it for another account than for which it is drawn), according to the law and custom of merchants generally observed, Abraham F. is bound to make the same good again

*699] *unto Benjamin G., with exchange, re-exchange, and costs: but Benjamin G. must be sure to make such his declaration before he do accept the bill, or any ways engage or oblige himself thereunto; for, otherwise, if he should first accept it, and then that it might be lawful for him at any time afterwards to alter the property thereof, and charge it for account of the drawer, at the acceptor's pleasure, the drawer, Abraham F., might be much prejudiced, as in reference to Charles H., by whose order (it may be), and for whose account, Abraham F. drew the same bill." Pl. 187. "If a bill of exchange be drawn upon a merchant, or any other here in London, and he refuse to pay it, or hath not money ready to make present payment at the day, and thereupon protest is made for non-payment, and another merchant or friend to the drawer, having notice thereof, doth appear and declare before a notary public that he will pay it for the honour of the drawer, upon protest, and accordingly doth pay the same, and cause an act to be made thereupon, as I have showed before: my advice is, that the receipt which he shall take for the money by him paid, be made and written under the protest and act, but not upon the original accepted bill of exchange, for divers reasons which I could give; but especially I approve of a receipt on the protest, and not on the bill, that so thereby he may still keep the bill free, as not being satisfied by those whom it did particularly concern; only (if he will) let the party to whom the bill is payable (and to whom the money is paid) subscribe his name on the backside of the bill to a blank, and let the protest and act be sent and returned to the party for whose account he doth honour the bill, but let him keep the accepted bill by him, to be ready upon all occasions against the acceptor." The person who pays for honour, must, before he makes the payment, unalterably fix for whom he makes the payment. The law of Scotland upon

*700] the subject is *thus laid down by a writer of considerable authority,—Thompson, on Bills, page 495: "In general, no party ought to pay a bill or note for honour of any other party, unless it has been previously protested for non-payment." And the law of France is laid down in Nougier, de la Lettre de Change, 2d edit. Vol. I. p. 346: "Le jour de l'échéance arrivé, le porteur envoie chez le tiré la lettre de change revêtue par anticipation de son acquit, et il requiert le paiement. Si le débiteur désigné n'a pas accepté, ou si, ayant accepté, et étant devenu insolvable, il refuse de solder la traite, le créancier fait dresser un acte de protêt conservateur de ses droits, et il peut ensuite retomber sur les endosseurs ou sur le tireur. C'est dans cette situation, et seulement après l'acte de protêt dressé, qu'il est loisible à un tiers, parent, ami, correspondant, ou débiteur de l'un des signataires, d'intervenir pour honorer sa signature, et de se mettre au lieu et place du propriétaire de la lettre, en lui comptant sa valeur." In Smith's Commercial Law, 4th edit. p. 218, it is said: "An acceptance for honour is a conditional undertaking to pay, if the drawee do not: it is equivalent to

saying to the holder, 'Keep the bill; do not return it: and, when the time arrives at which it ought to be paid, if it be not paid by the party on whom it is drawn, come to me, and you shall have the money.' In order, therefore, to complete the liability of the acceptor for honour, the bill must be presented for payment when it falls due, notwithstanding the former refusal of the drawee, who may possibly in the mean time have received assets. This presentment must, according to Mr. Chitty,^(a) be made, in cases of bills payable after date, on the day on which they would fall due according to their date; but, in that of a bill payable after sight, upon the day on which it would fall due, reckoning from *the acceptance for honour, and adding the three days of grace. [*701 Notice of the non-payment must also be given within due time to the acceptor for honour, otherwise he will be discharged. The statute 6 & 7 W. 4, c. 58, reciting that bills are occasionally accepted *suprà* protest for honour, or have a reference thereon in case of need, and that doubts have arisen, when bills have been protested for want of payment, as to the day on which they should be presented for payment to the acceptor or acceptors for honour, or referee or referees in case of need, enacts that it shall not be necessary to present them to such acceptor, &c., until the day following that on which they became due, and that, if the place of address on such bill of such acceptor, &c., be in any city, town, or place other than that wherein such bill shall be therein made payable, then it shall not be necessary to forward it for presentment for payment to such acceptor, &c., till the day following that of its becoming due; and, if the day following that on which it shall become due happen on Sunday, Good Friday, Christmas Day, or any day of solemn fast or thanksgiving, then it need not be presented or forwarded till the day following such Sunday, &c. An acceptance for honour made after the bill has been protested, is called an *acceptance suprà protest*, and care must be taken, at least in the case of a foreign bill, that such protest be made previous to either acceptance or payment for honour." There can be no ambiguity here; for, Mr. Smith refers to *Vandewall v. Tyrrell*. [MAULE, J.—The "noting" in *Vandewall v. Tyrrell* evidently means protesting; (b) and that appears from the report

(a) Chitty on Bills, 8th edit. p. 380.

(a) In Chitty & Halme, on Bills, 9th edit., p. 346, is a MS. note of the case of *Vandewall v. Tyrrell*, which differs somewhat from the report in Moody & Malkin, 87 (E. C. L. R. vol. 22). It is as follows: "Assumpsit for money paid by plaintiffs for use of defendant. Defendant, at Jamaica, drew four bills, dated 9th September, 1824, for 1500*l.* on Willis & Co., in London, payable nine months after sight; they were duly accepted, and became due 30th July, 1825. The acceptors could not pay, and the bills were merely noted for non-payment, and thereupon the acceptors requested plaintiffs to pay for honour of the defendant, the drawer, which they did on the 8th August, 1825, and notice thereof was given by post to defendant at Jamaica; but it appears, by the evidence of the notary, that he was not requested to *protest* the bill for non-payment till May, 1826, when he drew up the protest as if it had been made before the payment by the plaintiffs. Lord TENTERDEN decided that such a payment could not bind the defendant, or subject him to liability to refund, for that it was essential, according to the custom of merchants, that there should be a *formal protest for non-payment before the payment by a third person suprà protest*, and he therefore directed the plaintiffs to be nonsuited."

*702] to have *been done upon the first occasion. But it is not quite so clear that everything was done on the 30th of July, 1825, to entitle the notary to draw up a formal protest as of that day. It would be satisfactory if some more information about that case could be obtained. In Chitty & Hulme on Bills, 9th edit., p. 508, I find the following passage: "In general, no person should pay on honour of a bill, or of a particular party to it, before the bill has been duly protested for non-payment by the drawee; and, if he do, it will be presumed that his payment is on the behalf of the drawee, and he will have no claim upon the drawer or endorsers." For this Chitty cites Pardessus, 430.] The statute 6 & 7 W. 4, c. 68, provides for two cases, in one of which the protest is mere matter of evidence, in the other matter of title. [JERVIS, C. J.—Is not the ground in both cases the great publicity and notoriety of the protest? If so, and you can draw it up afterwards in the one case, why not in the other?] If the *book* is the protest, it is made public without a stamp.

Secondary evidence of the protests was not admissible, until the plaintiff had given some evidence of *attempts to get the originals. *703] "The best evidence," does not mean, the best evidence that is attainable by legal process. In the case of a mortgage-deed, the mortgagee is not bound to produce it; but, in order to excuse its non-production, it is not enough to show that it is in his hands; you must go further, and show that you have used due diligence to obtain it. In *Alivon v. Furnival*, 1 C. M. & R. 277,† in an action brought by the syndics of a French bankrupt upon an arbitral sentence and ordonnance, whereby the defendant was adjudged to pay the bankrupt a sum of money,—it was held that the agreement of reference (made in France) was sufficiently proved by an examined copy, and the evidence of the attesting witness; it appearing that the original was deposited with a notary at Paris for safe custody, and that it is the established usage in France not to allow the removal of a document so deposited. There, the secondary evidence was admitted, upon proof that due diligence had been used to obtain the document itself, and its production found impracticable. In *Boosey v. Davidson*, 13 Q. B. 257 (E. C. L. R. vol. 66), which was an action upon the case for infringement of copyright in certain musical compositions, the defendant by one of his pleas traversed the first publication in England: and, in support of that plea, the defendant called Signor Crippa, who was prompter to the Carcano theatre at Milan, in 1831. He stated that the opera of "*La Sonnambula*" was composed in 1831, by Bellini, a foreigner, and then resident at Milan; that it was represented at the Carcano in the early part of that year; that the witness prompted from the manuscript score, the performers also having their parts in manuscript; that the opera was very popular at Milan, and that it was usual to publish a popular opera shortly after its

first representation on the stage; that he had *heard the five airs [^{*704} in question sung by persons in private society at the pianoforte, with printed music before them, as if singing therefrom, previously to June 1831; and he mentioned a Madame Conti as one of the persons at whose house he had so heard the music. He was then asked whether, at the same period, he had seen printed copies of these airs for sale in Ricordi's shop at Milan. The counsel for the plaintiff then interposed, and asked the witness whether he could say that he had seen the identical copies then in court at Ricordi's shop, and, on the witness's answering that he could not, objected to the question about to be put on the other side, as referring to the contents of a printed instrument not produced or accounted for. Mr. Justice¹ ERLE held the objection valid. Upon a rule for a new trial, it was argued there, as here, that it was not practicable to get the book from Milan. But the court, in giving judgment, said: "The evidence in question was adduced to show that the printed paper lying before the musical performer had been purchased in the usual way, and which, for the present argument, may be assumed, and also that its contents were the same as those of the work registered by the plaintiff. *But the printed paper itself is the legal evidence of its contents*; and the plaintiff had a right to object that there was no legal evidence of its contents, unless it was produced or accounted for. The defendant showed no inability to produce the paper (indeed the contrary was rather apparent, as the bookseller and shopman who were supposed to have sold the work at Milan, were shown by cross-examination to be present at the trial); and he offered the several presumptions that the witness carried in his memory the words and music of the plaintiff's work, and the words and music that he had so heard in society, and could attest their identity, and also that the printed paper lying before the performer contained that which was being *performed, instead of the certainty which [^{*705} the production of the paper itself would have given, and which certainty is required by law, when it can be had." And the rule was discharged. *Cur. adv. vult.*

MAULE, J.,(a) now delivered the judgment of the court.

This is an action of assumpsit. The first count states that one Jean Petcheniff, on the 7th of August (old style), 1849, at Odessa, in Russia, drew a bill of exchange on the defendant, for 260*l.*, payable, three months after date, to the order of Messrs. Buba, Frères; that the defendant accepted the bill; that Messrs. Buba, Frères, endorsed it to Signori Fratelli Buba, di Moscow, who endorsed to Giles Loder, who endorsed to The London and Westminster Bank, who presented it when due, on the 10th of December, 1849, for payment; that payment was refused, and the bill protested for non-payment, on the said 10th of December, 1849; that, on the 11th of December, 1849, the plaintiff appeared before a notary public, and declared that he would pay the

(a) The Judges who concurred in this judgment, were JERVIS, C. J., and WILLIAMS, J.

bill, under protest, for the honour of the second endorsers; and that he paid it accordingly.

The second plea denied that the bill was protested; the third denied the payment under protest: on these pleas issues were joined.

The second count was on a bill for 220*l*. In other respects, that count, and the pleadings on it, were to the same effect as the first count and the pleadings on it.

At the trial before me, at the sittings after last Trinity term, it appeared that the bills had in fact been duly presented, and protested for non-payment, on the 10th of December, and that, on the 11th, they were *706] respectively paid by the plaintiff, through a notary, under protest, for the honour of the second endorsers. Protests were regularly drawn up, which were forwarded by post, on the 11th of December, addressed to the second endorsers, at Moscow. These protests were not produced at the trial; but secondary evidence was given of their contents, and also duplicates of them, drawn up by the notary, from his protest-book, in March and April last, after the commencement of the action, but before the trial.

A verdict was found for the plaintiff, for 495*l*. 14*s*., with a general leave for the defendant to move for a nonsuit, or a verdict for the defendant. A rule was accordingly obtained by my brother *Byles*; against which cause was shown in the last term. The court took time to consider, and I have now to pronounce their judgment.

Two points were insisted on, on behalf of the defendant,—first, that there was no primary evidence of the protests,—secondly, that secondary evidence was not admissible.

As to the first point, it was argued for the plaintiff, in showing cause, that the duplicate protests produced were original instruments; and that, when the fact recorded on a protest had taken place, and been duly entered by a notary in his book at the time of the transaction, it is sufficient if the formal protest be drawn up afterwards, though even after action brought. For this, several authorities were cited, and the known course of practice relied on.

On the part of the defendant, it was not denied that such was the general rule. But it was contended that this rule was liable to an exception, in case of a payment *supra* protest for the honour of a party to the bill; in which case, it was insisted, that it was not sufficient that the facts recorded *707] in the protest should have taken place, but that a formal instrument of protest must be drawn up, or extended, before the payment for honour; and that, consequently, the allegations that the bills were protested, and paid under protest, were not proved, inasmuch as the protests mentioned in the declaration must be understood to mean such protests as would give a right of action to a person paying for honour. The authority on which the defendant relied in support of the necessity of extending the protests before payment, was that of *Vandewall v.*

Tyrrell, M. & M. 87 (E. C. L. R. vol. 22), which has sometimes been considered as supporting the doctrine contended for by the defendant. That case was assumpsit for money paid by the plaintiffs to the use of the defendant. The defendant, who resided in Jamaica, drew four bills, dated the 9th of September, 1824, for 1500*l.*, on Willis & Co., in London, at nine months after sight. The bills were duly accepted, but were dishonoured, and were noted for non-payment at the time they became due, viz. on the 30th of July, 1825. The plaintiffs, on the request of the acceptors, paid the bills for the honour of the drawer, on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May, 1826, the notary public was instructed to protest the bill for non-payment; which he did. The protest purported to have been made before the payment, and in form asserted that the "plaintiffs were ready to pay for the honour of the drawer." The notary stated the custom to be, to protest formally before the payment. Lord TENNERDEN said: "The plaintiffs must be nonsuited: they sue upon the custom of merchants; that custom clearly is, that a formal protest should be made before payment is made for the honour of any party to the bill." This report being short, and somewhat obscure, the court took time to consider its authority, and requested *the parties to obtain further information respecting it. We have since been [*708 furnished with the brief which one of the counsel in the cause held at the trial; and this has thrown much light on the question. It appears from that brief, and the notes of counsel, that the bills in question in that cause were duly presented and noted on the 30th of July, 1825, the day they fell due; that the plaintiffs paid the amount of the bills to the holder on the 8th of August; and that the payment was made by a clerk of the plaintiffs', no notary being present, and nothing, as far as appeared, being said by the clerk, when he made the payment to the holder, as to paying for the honour of any person. There was, indeed, no intervention of a notary, with regard to this payment, until May, 1826, when the plaintiffs applied to the notary who had protested the bills for the holder, who then drew up acts of honour, on the same papers as the original protests for non-payment. The protests for non-payment were in the usual form, and stated that the notary, on the 30th of July, 1825, presented the bills to the acceptors, who refused payment. The acts of honour were not dated, but followed the signatures of the notary to the protests for non-payment, and were in these terms:—

"Afterwards, before me, the said notary, and witnesses, appeared Messrs. Vandewall and Tippler, of London, merchants, and declared that they were ready and willing to pay the bill of exchange before protested, under protest, for the honour, and upon the account, of Joseph Tyrrell, Esq., the drawer of the said bill; holding, nevertheless, the said Joseph Tyrrell and the acceptors of the said bill, and all others concerned, always bound and obliged to them, the said appearers, for

their reimbursement, in due form of law, and according to the custom of merchants. *Quod attestor.*" (Signed by the notary.)

*709] *The notary stated in evidence (according to the notes of counsel at the trial), that, when a payment is made for the honour of the drawer, the protest is made before payment. The same note represents Lord TENTERDEN as saying,—“ You must recover by the custom of merchants ; you have not complied with it, by protesting your bills before payment.” And thereupon the plaintiff was nonsuited.

It appears, therefore, that, in this case, the plaintiffs paid the bills on the 8th of August, 1825, without declaring to a notary, or otherwise, that they paid it for the honour of the drawer, and attempted to remedy this omission, by procuring an act of honour to be drawn up nine months afterwards ; the fact recorded in that document, that is, the declaration by the plaintiffs of their readiness and willingness to pay for the honour of the drawer, never having actually taken place. Now, it is a part of the mercantile law respecting payments for honour, that they must be preceded or accompanied by a declaration, made in the presence of a notary, for whose honour he pays the bill,—which should be recorded by the notary, either on the protest, or in a separate instrument.(a) It would, indeed, be contrary to a general principle of law and justice, if a person who made a payment, or did an act simply, without limit or qualification, could afterwards, by a subsequent declaration, limiting or qualifying its effect, affect the rights of others. No person, therefore, paying money simply to the holder of a bill, could, by the general rules of law, by a subsequent declaration, cause a payment so made to assume the character of a payment for honour. The custom of merchants requires the declaration which is to qualify the payment, to be made in the presence of a notary.

*710] In the case, therefore, of *Vandewall v. Tyrrell*, there *was a substantial omission of the declaration in the presence of a notary, which is necessary to give to the payment the quality of a payment for honour ; and not merely an omission to draw up a formal statement of such declaration : and this substantial omission was a clear ground of nonsuit ; and the decision may be sustained on that ground. But it also appears that it actually proceeded on that ground. The formal protest, which Lord TENTERDEN,—as reported in *Moody & Malkin*,—says should be made before payment for honour, and the protesting the bill before payment, mentioned in the note of counsel of what Lord TENTERDEN said,—“ You have not complied with it, by protesting your bill before payment,”—are to be understood, not of the protest for non-payment, or not of that alone, but either of the protest and the declaration before a notary that the payment is for honour, together, or of that declaration alone.

In the report in *Moody & Malkin*, the reporters seem to have con-

(a) *Beaver's Bills of Exchange*, pl. 53 ; *Marius*, 122.

sidered the protest for non-payment, and the act of honour, as one instrument; which they might naturally do, as they were on the same paper: and it was the plaintiffs' interest to treat the protest and act of honour as one instrument. The language of the reporters is,—“The protest purported to have been made before the payment, and in form asserted that the plaintiffs were ready to pay for the honour of the drawer.” Now, the protest for non-payment bore date the 30th of July, 1825, long before the payment: and it is in the act of honour, and not on the protest for non-payment, that the assertion of readiness and willingness is contained. The reporters, therefore, in speaking of the protest, must mean either the two instruments together, or the act of honour alone. In either case, the word “protest,” as used by them, must comprehend the instrument which contains the assertion of readiness and *willingness to pay. And Lord TENTERDEN, in speaking of a [*711 formal protest, must be understood as speaking of such formal declaration before a notary as is before mentioned. And this is confirmed by the marginal note of the reporters, which represents the decision to have been, that the party for whose honour the bill is paid, is not liable, “unless formal protest *of payment to his honour* be made before payment of the bill.” Lord TENTERDEN is represented, in the note of counsel, as saying,—“You have not complied with the custom of merchants, by protesting your bill in time.” This seems to point to an omission of something which, according to the usual course, the plaintiffs would have to do; and is more properly applicable to the omission of the notarial declaration which *they* ought to have made before payment, than to any omission of drawing up the protest for non-payment, supposing such omission to have taken place. Protesting the bill for non-payment was a thing to be done, not by the plaintiffs on the 8th of August, but by the holders on the 30th of July. It is no where stated, in express terms, at what time the protests for non-payment, in the case of *Vandewall v. Tyrrell*, were drawn up or extended. There is no doubt the bills were protested for non-payment, on the 30th of July,—the day they became due: and, probably, the protests were drawn up before the payment; for, it appears that the payment was made on the 8th of August, in order to prevent the bills being sent to Jamaica, under protest, by the packet which sailed on the 9th. The brief for the plaintiffs states that “the bills, on being dishonoured, were regularly protested by the holder and endorsee, Mr. Simon Taylor, of London, for non-payment. The bills of exchange and protests are as follows.” Then it sets out the bills and protests for non-payment. It afterwards states that the plaintiff applied “to the notary who had originally protested the *bills,” to prepare the extension of “the act of honour;” and he [*712 prepared it on the same sheet of paper as the original protest.” There seems no doubt, from these circumstances, that the protests for non-payment had been extended before the payment, and were, on the

8th of August, in the hands of the holder, Simon Taylor, who was about to send them to Jamaica the next day.

We have minutely examined this case, because it has sometimes been referred to as affording the high authority of Lord TENTERDEN to a proposition which introduces an inconvenient and anomalous exception to the general rule with respect to notarial instruments, that a duplicate made out from the original, or protocol, in the notarial book, is equivalent to an original made out at the time of the entry in the book. It appears, on this examination, that that case decides only, in conformity with general law, that a subsequent declaration cannot qualify a previous act, but that, in order to have such effect, the declaration must precede or accompany the act; and, in conformity to the law-merchant, that, in case of a payment for honour, the declaration must be formally made before a notary. There is, therefore, nothing in that decision, which establishes any exception to the general rule, or prevents its application to the present case. And we are of opinion, that, the bills having, in fact, been duly protested, and the declaration that the payments were made for honour duly made before notaries, and these facts recorded in the usual way in the notarial registers before payment, the duplicates produced at the trial were originals, and equivalent in all respects to the duplicates which were sent to Moscow; and that it was not necessary to prove the contents of the last-mentioned duplicates.

Taking this view of the first question raised in argument, it becomes unnecessary to determine the second question, whether the contents of the protests forwarded *to Moscow, might be proved by secondary evidence, inasmuch as, in whatever way that question might be decided, our determination of the first question would entitle the plaintiff to have the rule discharged. Rule discharged.

It is not necessary that the notary should make out his formal protest of a bill at the time of presenting it for acceptance or payment, which is refused; but it is sufficient if he makes a note of the facts at the time, and draws up his protest afterwards. *Bailey v. Dosier*, 6 Howard S. C. Rep. 23.

NEWNHAM v. STEVENSON and Another. Feb. 20.

The effect of bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once, by the bankruptcy, in the assignees, independently of any election on their part, other than their acceptance of the office of assignee: but, by a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, at their election, and the title of the transferee is perfect, except so far as it is avoided by the assignees.

The commencement of an action of trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot, without more, be taken to be an election on the part of the assignees to avoid the transfer.

Where, therefore, goods had been transferred by a trader before his bankruptcy, by an instrument which the jury found to be a fraudulent preference, and the transferee had, after the bankrupt-

cy, and after the appointment of assignees, brought an action for an illegal and excessive distress upon the goods which were the subject of the conveyance:—Held, that,—the assignees having no otherwise asserted their right to the goods than by commencing an action of trover to recover them,—it was not competent to the defendant to set up their title under “not possessed.”

THIS was an action upon the case. The declaration contained counts, —first, for distraining for more rent than was due,—secondly, for an excessive distress,—thirdly, for selling within five days,—fourthly, for selling the goods for less than they were reasonably worth,—fifthly, a count in trover.

The defendants pleaded not guilty “by statute,” and, to the count in trover, not possessed.

At the trial, the plaintiff abandoned the last two counts.

The goods distrained had been the property of Saunders, a trader, and were seized by the sheriff of Surrey, and by him assigned to the plaintiff, by bill of sale, on the 21st of June, 1849, under a judgment founded upon a warrant of attorney given by Saunders to the plaintiff in the month of February preceding.

*After the assignment, the goods remained upon the premises occupied by Saunders; but, on the 11th of September, the plain- [*714
tiff took possession of the goods, and Saunders and his family left the house. On the 5th of October, whilst the plaintiff was in possession of the goods, the distress was put in; and, on the 8th of the same month, Saunders filed a petition in bankruptcy, upon which he was declared bankrupt; and on the 22d, assignees were appointed.

It was not proved that the assignees had interfered with, or demanded, the goods of the plaintiff: they had not ratified the act of the defendants; but they had commenced an action of trover against the plaintiff for the conversion of the goods.

For the defendants, it was contended that the execution was a fraudulent preference, and an act of bankruptcy; that the property passed to the assignees; and that the plaintiff could not recover. To this it was answered that the *jus tertii* could not, under the circumstances, be set up; and that, at all events, the plaintiff, being in possession, might maintain this action.

In summing up, WILDE, C. J., told the jury, that, if the warrant of attorney was given voluntarily on the part of Saunders, for the purpose of securing the plaintiff in the event of a bankruptcy, whilst the rest of the creditors would be unsecured, it was a fraudulent transaction, and void; and that, in such case, the bill of sale would confer no property upon the plaintiff, who would not be the owner of the goods, and could not maintain the action. The jury found that the warrant of attorney was given by Saunders as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy: and upon this finding a verdict was entered for the defendants.

Byles, Serjt., in Michaelmas term last, obtained a rule nisi for a new

*715] trial, upon the ground of misdirection. *He cited *Biggins v. Goode*, 2 C. & J. 364,† and *Wood v. Wood*, 1 C. & P. 59 (E. C. L. R. vol. 12). [TALFOURD, J., referred to *Leake v. Loveday*, 4 M. & G. 972 (E. C. L. R. vol. 43), 5 Scott, N. R. 908.]

E. James, Phipson, and Prentice, on a subsequent day in the same term, showed cause.—The first question was, whether the warrant of attorney was fraudulent and void, as being a mere colourable contrivance to protect Saunders's property from his creditors, and so within the 13 Eliz. c. 5, s. 2. It was further contended at the trial, that the warrant of attorney was a fraudulent preference in contemplation of bankruptcy; and that Saunders had committed an act of bankruptcy, to the knowledge of Newnham, by procuring his goods to be taken in execution. [JERVIS, C. J.—The question is, whether it was competent to the defendants to set up property in the assignees. MAULE, J.—Whether, under not possessed, in trover, where the plaintiff is actually possessed, the defendant may set up the title of a third person without his authority.] The fraudulent manner in which the plaintiff has obtained possession must not be lost sight of. The assignees of Saunders have brought an action against Newnham for these very goods. [TALFOURD, J.—There is no trace of any claim on the part of the assignees, upon the learned judge's notes. MAULE, J.—The question is, whether, under not possessed to trover for goods, the defendant may set up the *jus tertii*, without showing authority,—as the majority of the judges in the Exchequer Chamber, in *Jones v. Chapman*, 2 Exch. 803,† held might be done in trespass to land, under a plea that the close was not the close of the plaintiff; or, in other words, whether a defendant without title can come and take the plaintiff's goods, and then say they are not the goods of *716] the plaintiff, but the goods of a third person, *having no authority from such third person.] It is admitted that Stevenson had a right to enter and distrain to the extent of 45*l.* 17*s.* 7*d.*: the only question is as to the excess. According to *Leake v. Loveday*, 4 M. & G. 972 (E. C. L. R. 43), 5 Scott, N. R. 908, the plaintiff must prove affirmatively that he has property in the goods. There, in December, 1847, certain goods of one Cox were seized by the sheriff, under a writ of *fi. fa.*, and by him conveyed to the plaintiff by bill of sale, the goods remaining in Cox's possession under a secret arrangement between him and the plaintiff. In December, 1838, a *fiat* issued against Cox, under which he was duly declared a bankrupt. In August, 1841, the goods (which still remained in Cox's possession) were again seized by the sheriff under other writs of *fi. fa.*, and by him sold, and the proceeds paid over *under an indemnity* to the assignees, who then for the first time asserted their right. In trover by the plaintiff against the sheriff, the jury having found that the goods were in the order and disposition of Cox as the reputed owner, at the time of the bankruptcy, with the consent of the true owner,—it was held that the sheriff was not, under

the circumstances, precluded from setting up the title of the assignees as an answer to the action. The judgment of TINDAL, C. J., in that case, applies expressly in principle to this case. "The action," he says,^(a) "is trover: the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as of his own property: and the question is, whether, under the plea of not possessed, the defendants are at liberty to set up the title of third persons. It appears to me from the very form of the plea, that the plaintiff is called upon affirmatively to prove property in himself, and that the defendant is let into any defence tending to deny the *plaintiff's right of property. Under the old rules of pleading, [*717 the count in trover involved two propositions, both of which were put in issue by the general issue, viz., that the goods were the property of the plaintiff, and that they had been converted by the defendant. There are many cases before the new rules where the defendant has been permitted to set up the *jus tertii*." His lordship then referred to *Blainfield v. March*, 1 Salk. 285, and *Dawes v. Peck*, 8 T. R. 330, and proceeded,—“These authorities are sufficient, without citing more, to show, that, under the plea of not guilty, it was competent to a defendant to set up the right of a third person as an answer to the action. And I do not see why the same should not be allowed under the plea of not possessed.” [JERVIS, C. J.—In that case, there was no possession in the plaintiff.] Here, the possession of the plaintiff was found by the jury to have been obtained by fraud. [JERVIS, C. J.—It was an actual possession.] Suppose the assignees recover in the action now pending at their suit, and the plaintiff recovers in this action, he would be recovering a verdict in respect of property which is not, and never was, his property. COLTMAN, J., in the case last cited, says:^(b) “The meaning of the plea of not possessed, is, that the plaintiff has no property in the goods, in respect of which he is entitled to maintain the action against the defendants. Has he any property in these goods? The conversion is said to have taken place at the time of the seizure by the sheriff: and it is said that the sheriff was a wrongdoer at that time as against the plaintiff, the assignees not having then asserted their right. But they do afterwards assert their title, and the consequence is that their assertion of title, when it does take place, vests the property in them from the time of the bankruptcy. Upon this state of facts, the sheriff is *no wrongdoer as against the plaintiff; for, he has [*718 seized, not the plaintiff's goods, but the goods of the assignees. The plea, therefore, is found for the defendants, provided they are not estopped from setting up the title of the assignees as a defence. The rule as to precluding parties from setting up the *jus tertii*, is not so extensive as has been contended. I have always understood it to apply only where the party has placed himself in a position to prevent him from averring the truth. I think this is not a case in which the rule

^(a) 5 Scott, N. R., 922.^(b) *Ib.* 923.

applies." [JERVIS, C. J.—The action is founded on *property*: possession is only *evidence* of property.] Here, we show that the possession was so acquired that it can be no evidence of property. If the plaintiff's possession was illegal, the case falls distinctly within *Leake v. Loveday*. *Rowe v. Ames*, 6 M. & W. 747,† shows that this defence, if available at all, amounts to not possessed; and to that extent is an authority for the defendant. In *Howarth v. Tollemache*, 5 Scott, N. R. 329, 4 M. & G. 427 (E. C. L. R. vol. 43), in trover against the sheriff, for seizing certain goods of the plaintiff, the defendant pleaded, that a *fi. fa.* against the goods of one H. was delivered to him as sheriff to be executed; that the goods in the declaration mentioned were the goods of H.; that H. fraudulently and collusively gave and delivered to the plaintiff possession of the goods, under colour of a feigned, covinous, and fraudulent alienation, bargain, and conveyance thereof from him to the plaintiff, then made, to the end, intent, and purpose to delay, hinder, and defraud the execution-creditor and the other creditors of H. of their respective lawful actions, debts, and demands against H., contrary to the statute; and that the plaintiff claimed title to the goods under colour of the said feigned, covinous, and fraudulent alienation, *719] bargain, and *conveyance thereof, &c.: and it was held, that the plea was bad, as a mere argumentative denial of the plaintiff's possession. The lord chief justice at the trial referred to *Doker v. Haslar*, 10 J. B. Moore, 210 (E. C. L. R. vol. 17), 2 Bingh. 479.(a) If the assignees of Saunders had claimed here, that would have been this case. What difference can it make whether the assignees claim before or after pleading? *Hardman v. Willcock*, 9 Bingh. 382 (a) (E. C. L. R. v. 23), is also an authority for the defendants.

Byles, Serj., *Pashley*, and *John Gray*, in support of the rule.—It clearly was not competent to the defendants to set up the *jus tertii*. Where it is a mere question of title,—neither party being in possession,—the *jus tertii* may be set up, whether in trespass or in trover: *Butler v. Hobson*, 5 Scott, 798, 4 N. C. 290: but it is otherwise where the goods are taken out of the possession of a party. BOSANQUET, J., in that case, says: (b) "As to the *jus tertii*, the property not being in the plaintiff's possession, I see no objection to the defendant being allowed to show that the right is vested in another." And COLTMAN, J., adds:

(a) There, the plaintiff's attorney enclosed a writ of *fi. fa.* to the sheriff's officer, in a letter, and told him that he might with safety put the defendant's mother, or any one else, in possession of the defendant's goods, and the officer acted accordingly, and left his warrant in charge of one of the defendant's shopmen, and the business was transacted as usual for nearly three months from the time the warrant was left; and the shopman accounted to the officer for the moneys received, who paid them over to the sheriff. The defendant having become bankrupt, his assignees indemnified the sheriff in returning *nulla bona* to the writ issued previously to the bankruptcy. In an action against the sheriff for a false return, the jury having found that the writ was sued out for the purpose of protecting the property of the party against other creditors, the court refused to grant a new trial, on the ground that the plaintiff had not made out the allegation in the declaration, that the writ was delivered to the sheriff to be executed in due form of law.

(a) 5 Scott, 822.

"It is said *that it is not competent to the defendant to set up the *jus tertii*. It is, however, a mistake to suppose that there is any general rule to prevent the assertion of the *jus tertii*. It is true that an agent or a tenant cannot set up the *jus tertii* against the principal or the landlord: but I know of no rule of law to prevent such right being set up by a stranger in answer to the claim of one who is out of possession." Here, possession was out of the question. *Leake v. Loveday* proceeded very much upon the authority of *Butler v. Hobson*. There, the goods were in the possession of Cox. [WILLIAMS, J.—Had not Leake in fact possession? He allowed Cox to keep them.] He had demised them to Cox. [MAULE, J.—Surely, for this purpose, the possession of the tenant was the possession of the landlord. No doubt, Leake had a perfectly good *prima facie* title, in case for an injury to his reversion.] In no case has a defendant been allowed to set up the title of a third person against a case of possession, where the third person himself did not interfere. The main difficulty in this argument, is, that, if the plaintiff succeeds upon the count in trover, it may be that the assignees of Saunders may come and recover the property against him a second time. That seems a strong reason why the defendants should be allowed to set up the title of the assignees. But, on the other hand, the plaintiff would be liable to an action at the suit of the assignees; and it was part of the defendants' case that the assignee had actually brought an action against them. [MAULE, J.—If the plaintiff pays the money to the assignees, he may demand the goods, and then he may maintain his action.] He would not be the owner until after a judgment in trover against him: *Cooper v. Shepherd*, 3 Com. B. 266 (E. C. L. R. vol. 54). A fraudulent preference in contemplation of bankruptcy may be inferred by a jury from *circumstances, without proof that a distinct act of bankruptcy was contemplated: [*721 *Aldred v. Constable*, 4 Q. B. 674 (E. C. L. R. vol. 45). In *Nelson v. Cherrill*, 8 Bingh. 316 (E. C. L. R. vol. 21), 1 M. & Scott, 452 (E. C. L. R. vol. 28), it was held, that, in trespass for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person to defeat the action. [WILLIAMS, J., referred to the *dictum* of Lord ABINGER in *Fyson v. Chambers*, 9 M. & W. 465.†] The question was discussed in *Giles v. Grover*, 6 Bligh. N. S. 277, 2 M. & Scott, 197 (E. C. L. R. vol. 28), 9 Bingh, 128 (E. C. L. R. vol. 23), where Lord TENTERDEN says: (a) "It has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrongdoer. These actions are maintainable upon a ground perfectly distinct from the right of property: they are maintainable upon the ground of possession: any man in possession of goods, whether as the bailee or otherwise, may in his own

(a) 6 Bligh, N. S. 452, 2 M. & Scott, 322, 9 Bingh. 280 (E. C. L. R. vol. 23).

name maintain an action against any party who shall deprive him of the possession." The matter is further discussed in Story on Bailments, §§ 93, 94, and in 2 Wms. Saund. 47 *e*, and also in the case of *The Bailiffs, &c., of Dunwich v. Sterry*, 1 B. & Ad. 831 (E. C. L. R. vol. 20.)

Cur. adv. vult.(a)

JERVIS, C. J., now delivered the judgment of the court.

*722] "After stating the facts, *ut ante*, his lordship proceeded: We have taken time to consider our judgment in this case, in order that we might examine the authorities which were cited, and be enabled, by reference to the notes of the evidence and the summing up, to ascertain correctly the facts which raise the point, and the manner in which those facts were left to the jury.

It is unnecessary to consider whether the direction of the learned judge was confined to a fraudulent preference, strictly so called, or was intended to comprehend also a transaction intended only to protect the goods against creditors, but to pass no property to the plaintiff; because the jury found that the warrant of attorney was a fraudulent preference; and upon that finding the verdict was entered.

Upon the facts proved, and upon this finding of the jury, we are of opinion, that the verdict ought not to have been entered for the defendants, that the learned judge misdirected the jury, and that the rule for a new trial must be made absolute.

It is not necessary to determine whether the bare possession of a mere wrongdoer will, as against a mere wrongdoer, entitle the former to maintain trover or trespass: nor need we, upon the present occasion, advert to the distinction in this respect between trover and trespass, recognised by the civil law, and noticed in many cases. Here, the finding of the jury imports that Saunders intended the property to pass. To be preferred to others, the plaintiff must take a property in the goods; and, if no bankruptcy had intervened, he would have been the indefeasible owner in possession of the goods, and might have maintained the action. The effect of a bankruptcy upon a fraudulent preference, is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once by the *723] bankruptcy in the assignees, independently *of any election on their part, other than their acceptance of the office of assignee. By a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election; and the title of the transferee is perfect, except so far as it is avoided by the assignees. The assignees in this case were not proved to have

(a) A further point was made on the argument, viz. whether the assignees could impeach the act of the bankrupt, he himself being the petitioner,—upon which the following cases were cited; for the plaintiff, *Tope v. Hockin*, 7 B. & C. 101 (E. C. L. R. vol. 14), 9 D. & R. 881 (E. C. L. R. vol. 22); and, for the defendant, *Ex parte Philpott*, De Gez, B. C. 348, *Ex parte Norton*, De Gez, 3 C. 504, *Everett v. Wells*, 2 M. & G. 269, 2 Scott, N. R. 525, and *Oswald v. Thompson*, 2 Exch. 15.†

done anything to affect the plaintiff's title. They had not demanded the goods of the plaintiff: they had not even ratified the defendants' act: and the commencement of an action of trover,—which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully,—cannot, without more, be taken to be an election on the part of the assignees to avoid the transfer. We need not, therefore, consider the questions which might have arisen, had the assignees interfered. Until they *do* interfere, the plaintiff, without doubt, is not only in possession, but is the owner of the goods, and the defendants, mere wrongdoers, cannot set up the title of the assignees.

The plaintiff is in actual possession, which is *prima facie* evidence of property. The case of the defendants is, that the plaintiff's property was acquired by a transfer from the bankrupt, which the assignees, and they only, have a right to question. They do not show that the assignees have questioned it: they show that the assignees, or any one claiming under them, or authorized by them, might take the goods: but the plaintiff has the sole property, and ought to keep the goods, against all others.

The cases of *Leake v. Loveday*, 4 M. & G. 972 (E. C. L. R. vol. 43), 5 Scott, N. R. 908, and *Hardman v. Willcock*, 9 Bingh. 382(a) (E. C. L. R. vol. 23), were principally relied upon in the argument for the defendants.

*In *Leake v. Loveday*, the plaintiff brought trover for goods [*724 not in his actual possession at the time of the conversion. It was, therefore, necessary for him to show a title, which he did, by showing, that, at one time, the goods were his. In answer to this case, the defendant proved that the goods, at the time of the conversion, were, with the consent of the plaintiff, the true owner thereof, in the order and disposition of a person who had committed an act of bankruptcy, and against whom a commission issued, and thus that the title which the plaintiff once had was at an end,—the consent of the plaintiff, together with the bankruptcy, transferring the property and right of possession to the assignees, as effectually as if the plaintiff had sold and delivered the goods to the bankrupt; in which case, whether the assignees claimed the goods, or neglected to do so, the goods would be theirs, and not the plaintiff's. There, the goods were in the order and disposition of the bankrupt: here, they were transferred from the bankrupt by fraudulent preference. The distinction is obvious: and, that case, when properly understood, ought not to govern the present.

In *Hardman v. Willcock*, the plaintiff had no property in the goods, special or otherwise: they had been removed, by collusion between him and an insolvent, to whom they belonged: they had been sold by an auctioneer employed by the plaintiff; and, upon an action for money had and received, the assignees interfered; and the jury found that the plaintiff's possession arose out of a fraud concocted between him and

the insolvent. The principal question was, whether the auctioneer was bound to account to the plaintiff, from whom he received the goods: but the court held, that, inasmuch as the insolvent could not have brought an action against the auctioneer, so neither could the plaintiff, who got possession by fraud between himself and the insolvent.

*725] *It becomes unnecessary to express any opinion upon the other point discussed during the argument, viz., whether the assignees could impeach the act of the bankrupt, he himself being the petitioner.

We are of opinion that the rule for a new trial should be made absolute. Rule absolute.

The cause was tried again, at the sittings after Trinity term, 1851, before JERVIS, C. J., who ruled in accordance with the former decision of the court; and a verdict was found for the plaintiff.

A bill of exceptions was tendered on behalf of the defendants, which is now pending.

In the action at the suit of the assignees, in the Court of Exchequer, there was a verdict for the plaintiffs.

*726] *COUNTY-COURT APPEAL.

UNDER THE STATUTE 13 & 14 VICT. C. 61.

[Before MAULE, J., WILLIAMS, J., and TALFOURD, J.]

THE EAST ANGLIAN RAILWAYS COMPANY v. LYTHGOE.

Feb. 21.

A. was clerk to B. under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or payment of three months' salary. B. dismissed A. without notice, under circumstances which a county court judge decided not to be a legal justification for such dismissal, and afterwards sued him for money had and received:—Held,—upon an appeal under the 13 & 14 Vict. c. 61, s. 14,—that A. was entitled to set off in that action the amount of the three months' salary; and that the decision of the county court judge upon the facts could not be reviewed. *Semle, per MAULE, J.*, that the convenient construction of the 14th section would be, that an appeal lies not in any case where the county court judge performs the functions of a jury.

THE following case was sent from the County-Court of Norfolk, for the opinion of the judges of this court, pursuant to the statute 13 & 14 Vict. c. 61, s. 14:—

This was an action brought in the County-Court of Norfolk, held at Lynn, for 30*l.* claimed by the plaintiffs to be due to them from the defendant, as money had and received to their use.

Upon the trial of the cause, it was not denied that the money was had and received by the defendant on account of the company: but the defence was, a set-off for a larger amount, viz. 85*l.*, alleged by the defendant to be due to him from the company for three months' salary as their clerk: and the question between the parties, was, whether this set-off could be supported.

*The facts as they appeared in evidence were these:—The defendant was the audit-clerk to the plaintiffs, under an agreement [*727 for 140*l.* a year, determinable by three months' notice, or payment of three months' salary. The whole of the traffic accounts of the company's railways, and all other the books of account of the plaintiffs, were under the defendant's charge, or accessible to his inspection. It was part of the defendant's duty to keep up from week to week the statistics of the said railways, with a view to their publication to the shareholders at the end of each half-year. It might be of importance to the interests of the shareholders, that such information should not transpire, except at the periodical meetings; so that no unfair advantage might be derived from priority of information.

In the month of August, 1850, it was discovered that the defendant was carrying on a private correspondence with Mr. Eadson, the traffic manager on the East Lancashire Railway; and also with Mr. Murnane, a clerk on the Eastern Counties Railway, who transacted at Ely the business as well of the Eastern Counties Railway Company as of the East Anglian Railways Company,—the latter company having an arrangement with the former for the use of their station and clerk (Mr. Murnane not being the servant of the East Anglian Railways Company, as assumed in the judgment hereinafter set out.)

Upon this discovery, the directors challenged the defendant with the fact; which he for some time strenuously denied; but, ultimately, he produced a manifold writer, in which there appeared, in his own handwriting, the three following letters, which the defendant admitted he had written:—

Lynn, Norfolk, May 21, 1850.

"Dear Sir,—In the absence of the secretary, I opened *your [*728 solicitor's letter for payment of your expenses, 34*l.* 3*s.* The request and amount appear 'nobby,' and I wish you may get it. Snell (the secretary's factotum) has written to Bruce for particulars, so that the bill may be laid before the board on Friday next.

"Mr. Clay and I are getting on famously together; but I regret to say our situations are not worth three months' purchase. There is still a good deal of angry feeling on the part of the bond-holders; and I doubt not but the lines will be let to Baxendale, or some other great capitalist. Our traffic is miserable, and insufficient to pay 5 per cent. to the creditors.

"Mr. Eadson."

(Signed) "J. LYTTON."

"Lynn, Norfolk, May 25, 1850.

"Dear Sir,—I have just seen the letter which Bruce has requested to be written in answer to your solicitor. It appears that Bond, who is absent from Lynn, has got your bill somewhere in his possession; for it cannot be found. This is just the kind of excuse our people like to make; and you will have no hesitation in pronouncing it as humbug practised by humbug Bruce. When the duplicate bill comes to him, you will have to wait until the next board day, fourteen days hence, before it can be paid (if paid then). I need hardly remark that our committee of creditors and directors consider it an extortionate amount. That they should have this idea pleases me right out; for, I know they will complain at old Bruce until he becomes thoroughly wild. Wishing you may get the 34l. 3s. net cash, I remain, &c.

"R. Eadson, Esq."

(Signed) "J. LYTHGOE."

"5 August, 1850.

"Dear Sir,—Look well over the Hartlepool Coal Company's accounts, and see that they are all paid to you. I am in hopes that you will find something of advantage to you in this matter. I have private *729] reasons *for drawing your attention to this, and shall require you to keep this communication to yourself. Yours truly,

"Mr. Murnsne."

(Signed) "J. LYTHGOE."

The directors thereupon discharged the defendant from his said employment. On being informed that he was discharged, the defendant said,—"Well, gentlemen, I shall not seek a reversal of your sentence; for, I feel that I have deserved it all."

The letters of the 21st and 25th of May were put in evidence by the defendant's attorney. The letter of the 5th of August was put in evidence by the plaintiffs' attorney. But the defendant denied that he had posted the letter of the 21st of May; though, at the same time, he admitted the facts above stated with reference to the circumstances of his discharge, and also admitted that he had not on any previous occasion denied the posting of such letter. He admitted the posting of the letters of the 25th of May, and 5th of August.

The plaintiffs objected to the admission of any evidence in support of the defendant's set-off, on the ground that the claim, if maintainable at all, was for damages, which could not be the subject of a set-off, no service having been performed during the three months in respect of which the salary was claimed, and the period not having elapsed at the commencement of this action.

The judgment of the county court was to the following effect:—The question is not whether the company was justified morally, or even legally, in dismissing the defendant: but whether they were justified legally in dismissing him *without notice, or payment of three months' salary*. It has been held, in *Callo v. Brouncker*, 4 C. & P. 518 (E. O.

L. R. vol. 19), that, to justify such a dismissal, there must be proved against the party moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. (a) Neither of *the two latter is [*780 imputed to the defendant. Has he been guilty of the former? I think he would have been guilty of moral misconduct, if it had been proved against him that he had made use of a knowledge acquired by virtue of his employment, to the prejudice of his employers. Let us examine whether there is any *proof* of that: and let it be always remembered that it is the duty of any one making such a charge *to support it by legal proof*. A great writer has said that "thoughts are no subjects." A man has a right to think what he pleases, and also to commit his thoughts to paper, provided he does not allow any one to see the paper. Therefore, as the first letter was *never published*, I am bound to dismiss it from my consideration; for, the burthen lies upon the company to show that the defendant not only *contemplated* committing, but *did actually commit*, such an offence as I have described. Let us now examine the second letter. That letter begins by giving information *which the company had actually had written for the very purpose of giving such information*. As the company could not be prejudiced by its earlier communication, there was nothing injurious to them in making it. But it also charges the company with *shuffling conduct*. This was a most improper communication to proceed from an employé of the company, and would (morally) abundantly justify the company in dismissing the defendant; but it will not legally justify the company in dismissing him without notice, or salary: because I think a proper test by which to try it is this, that, in an action for the libel, no damages would be recovered unless *special damage* were proved. The remainder of the letter seems to breathe considerable personal hostility to Mr. Bruce: but it is not a matter affecting the company. If there had been anything apocryphal in the third letter, it was the duty of the company to prove it. All that I can collect from it, is, an exhortation to Mr. Murnane, a *servant [*781 of the company, *to do his duty*. His *duty* was, "to look well to the accounts:" and it would be his interest to do his duty. Whether there had been any suspicion that he had been remiss, I know not: but, an exhortation to a man to do his duty, cannot be an *offence, whoever may give it*. For these reasons, I do not think that the company has made out a legal justification for dismissing the defendant without notice; and the set-off must be allowed.

The question for the opinion of the court is, whether the set-off was properly allowed.

Wheeler, for the appellants.—The dismissal of the defendant by the company was, under the circumstances, justifiable; and, even if it were not, his claim for salary is not properly the subject of a set-off.

1. The decision of the judge was clearly wrong upon the first point.

(a) And see *Smith v. Thompson*, 8 Com. B. 44 (E. C. L. R. vol. 65).

[MAULE, J.—Does this case involve anything more than a question of fact? A quantity of evidence is set out, and a speech of the judge. But I doubt whether we can take notice of anything more than “judgment for the defendant:” we cannot take notice of any bad reasons assigned by the judge. The right of appeal is given by the statute(a) *732] in certain cases only, *viz., where a party is dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of evidence.] The case finds certain facts, and it is for the court to say whether or not they amount to misconduct such as to justify the defendant’s dismissal. [MAULE, J.—No fact is found: there is a statement of evidence.] The judge has found that which amounts to moral misconduct: and it is submitted that the evidence shows that the company were justified in discharging the defendant from their employ. It shows that he disclosed information which he could only possess by virtue of his employment. [WILLIAMS, J.—How would you have framed a special plea justifying the dismissal?] By showing that the clerk had been guilty of improper conduct, to the prejudice of his employers. [MAULE, J.—Upon a replication *de injuriâ* to such a plea, how would the matter be tried?] By a jury. [MAULE, J.—Who has found it here?] The judge. [MAULE, J.—No: he has refused to find misconduct. How can we review that? WILLIAMS, J.—If the judge was performing the functions of a jury, there is an end of the case.] In *Fillieu v. Armstrong*, 7 Ad. & E. 557 (E. C. L. R. vol. 34), 2 N. & P. 406, where the jury came to a similar conclusion, upon a plea justifying the dismissal of a schoolmaster, the court gave judgment for the defendant *non obstante veredicto*. [MAULE, J.—There, the *733] *court held the plea bad, inasmuch as it neither showed that the contract was put an end to, nor that the defendant had a right to dissolve it.] In *Amor v. Fearon*, 9 Ad. & E. 548 (E. C. L. R. vol. 36), 1 P. & D. 398, it was held, that, if a clerk, retained at a salary to manage a mercantile business, declares that he is a partner, and will transact the business as such, the employer may immediately dismiss

(a) The appeal is given by the 13 & 14 Vict. c. 61, s. 14, which enacts, “that, if either party in any cause of the amount to which jurisdiction is given to the county-courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose; provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed; provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county-court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the county-court in which such action shall have been tried, and the same shall have been paid accordingly; and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper; and such order shall be final.”

him,—although the clerk has not committed any other misconduct, or refused in terms to go on as clerk. [WILLIAMS, J.—A rule for a new trial was asked for there, on the ground that the lord chief justice left to the jury that which he ought to have decided himself, viz. whether certain conduct was a reasonable cause of dismissal: but the court refused it.] The legal inference to be drawn from the facts, is for the jury. [MAULE, J.—I think, if county-court suitors mean to avail themselves of the power of appeal, they must take care to keep the law and the fact separate, by having juries. “Admission or rejection of evidence” must, I think, mean, admission to the jury.] It means the admission or the refusal to admit evidence to that tribunal which is to pronounce upon its value. Here, the judge improperly withholds the first letter from that tribunal. He dismisses it from his mind. That amounts to a rejection of evidence. [MAULE, J.—The statement of the judge amounts to this,—I admitted the letter: but I afterwards dismissed it from my mind, because I inferred that the defendant never sent it. In his capacity of judge, he receives the evidence: in his capacity of juror, he declines to give effect to it. He stands somewhat in the situation of an arbitrator.] The writing of the letter was an act which was injurious to the defendant’s employers. [WILLIAMS, J.—Suppose the defendant had burnt the letter the instant he wrote it?] The act of writing it shows a state of mind inconsistent with his *duty to his employers. The materials for decision were not before the [*734 judge at the time he came to pronounce his judgment. [MAULE, J.—You cannot tie up the judgment to the reasons that are given for it.] At all events, there ought to be a new trial.

2. As to the set-off, the law is thus laid down in the notes to Cutter v. Powell, 6 T. R. 320, in 2 Smith’s Leading Cases, p. 20:—“Perhaps the result of the authorities on this subject may be, that a clerk, servant, or agent wrongfully dismissed, has his election of three remedies, viz., that, 1. He may bring a special action for his master’s breach of contract in dismissing him, and this remedy he may pursue immediately: Pagan v. Gandolfi, 2 C. & P. 370 (E. C. L. R. vol. 12): 2. He may wait till the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service: Gandell v. Pontigny, 4 Campb. 375: and see Collins v. Price, 5 Bingh. 132 (E. C. L. R. vol. 15), 2 M. & P. 233 (E. C. L. R. vol. 17), and Smith v. Kingsford, 3 Scott, 279: *vide tamen* the observations of the judges in Smith v. Hayward, 7 Ad. & E. 544 (E. C. L. R. vol. 34), 2 N. & P. 432: 3. He may treat the contract as rescinded, and may *immediately sue*, on a quantum meruit, for the work he actually performed: Planché v. Colburn, 8 Bing. 14 (E. C. L. R. vol. 21), 1 M. & Scott, 51 (E. C. L. R. vol. 28): but, in that case, as he sues on an implied contract arising out of actual services, he can only recover for the time that he *actually* served.” [MAULE, J.

—That is, where the clerk or servant has been wrongfully dismissed. Here, the defendant was not wrongfully dismissed. The set-off was an agreed sum: the case so finds.] In *Howlet v. Strickland*, 1 Cowp. 56, ASHHURST, J. says: “Debts, to beset off, must be such as an indebitatus assumpsit will lie for:” and *Fewings v. Tisdal*, 1 Exch. 295,† shows *785] that such an action would not lie here. [MAULE, J.—Possibly not: but the 35*l.* might have been recovered under a special count. WILLIAMS, J.—In *Duckworth v. Alison*, 1 M. & W. 412,† by articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated, that, in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work, 5*l.* weekly and every week, such penalty to be deducted from the amount which might remain due on the completion of the work: and it was held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct, or to recover it.] That case underwent no discussion. [WILLIAMS, J.—*Fletcher v. Dyche*, 2 S. R. 32, is a still stronger case: it was there held, that, if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time,—such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed.] There, *debt* would have lain. [MAULE, J.—Would not debt lie here for an agreed sum? By the terms of the contract, the company had a right to dismiss the defendant at their pleasure, subject to the payment of a certain ascertained amount.]

Worledge, contra, was stopped by the court.

*MAULE, J.—I entertain not the slightest doubt in this case. *786] If *any* point is legitimately brought before us by this appeal, it is the last. I think it is perfectly clear, that, where there is a contract like this for the payment of a certain sum on a given event, upon the happening of that event an action lies for the recovery of that sum: and it is equally clear that it becomes the proper subject of set-off. If, therefore, the point is properly raised by this case, it seems to me that it was rightly decided by the learned judge of the county-court.

The judgment of the county-court judge upon a matter of fact, cannot be the subject of review in this or any other superior court. It may be in the case of a determination or direction of the judge in point of law, or in the case of an improper admission or rejection of evidence. There was no evidence rejected here: everything that was offered seems to have been received. But the judge, in giving what, in popular language, is

called his judgment, let fall some expressions which seem to be open to some little criticism. Those expressions, however, are not to be taken as the grounds or reasons of the judgment. That must be sustained, if it can be supported on *any* ground, notwithstanding that the reasons which are stated are manifestly insufficient. We must, therefore, exclude the judge's reasons: they form no part of the case, and might with propriety be struck out. It seems to me that the case involves facts, and that what law there is in it is inextricably mixed up with the facts; and that, in such a case, it was never intended by the legislature that there should be any appeal. The 14th section of the statute, by the very terms of it, gives an appeal where the determination or direction of the court is wrong in point of law, or where evidence has been improperly admitted or rejected. Now a direction in point of law, is, where the judge tells the jury that the construction of a given instrument *is so and so. [*737 The admission or the rejection of evidence, also, are matters which one can very well understand. But, where the judge states a number of facts, and draws a conclusion from them, even if we can see most clearly that he has mistaken or misapplied the law, I do not think that the proper subject of an appeal. It would be extremely inconvenient, in my opinion, that an appeal should lie in such a case. Where the matter in dispute exceeds 5*l.*, either party may have a jury; (a) and then there will be no difficulty; for, the course will be precisely the same as at *nisi prius*. If that be the correct view, it would necessarily preclude appeals, except in cases where either of the parties thinks fit to have a jury summoned. And I think, so construed, the enactment in question would be a wise one. For these reasons, I entertain great doubt whether any appeal is given in a case of this sort: but, assuming that it is given, I think the only question of law which it presents is abundantly clear, and consequently that this appeal should be dismissed, with costs.

WILLIAMS, J.—I am of the same opinion. The only possible ground of appeal, is, that the judge improperly allowed the set-off. For the reasons given by my brother MAULE, I think the set-off was well allowed. As to the other question, it seems to me that it was purely one of fact, and that, however erroneous the judge's conclusion may have been, we are not authorized to review it. It is said that the judge was wrong in rejecting evidence of the first letter. But it does not appear that he rejected anything. The only objection, in truth, is, that he did not give sufficient weight to it. That clearly is no ground of appeal.

*TALFOURD, J.—I am of the same opinion. The only question of law, is, whether this salary can be the subject of set-off. I [*738 think the judgment was right. The other question sought to be raised, was purely a matter of fact. We cannot review the judge's decision, because it is an act of his mind to which other minds may not entirely

(a) 9 & 10 Vict. c. 95, s. 78.

accede. Such evidence as this being received, a juryman might dismiss it from his mind. The judge has done no more than that.

Worledge, for the respondent, asked for an order that judgment be entered for him.

MAULE, J. (referring to the section of the statute).—I doubt that we have any jurisdiction to do that. We can only dismiss the appeal.

Appeal dismissed, with costs.

END OF HILARY VACATION.

THIS was an action of assumpsit. The first count of the declaration stated that the plaintiff, with others, had been performers in the orchestra at the *Royal Italian Opera House, Covent Garden; that a large sum, to wit, 1280*l.*, was due to the plaintiff and the others in respect [*740 of their performances, for thirteen nights; that thereupon, in consideration that the plaintiff and the others would continue their services to the end of the season, the defendant promised the plaintiff to pay to the

plaintiff and the others, at &c., on, &c., the said sum of 1280*l.*; and that he, the plaintiff, and the others, did continue their services to the end of the season: Breach, non-payment of the 1280*l.*

The second count alleged the promise to be, to pay the 1280*l.* to the plaintiff and the others, and to make payments in respect of such performances of the plaintiff and the said other persons subsequent to the time of the promise, viz., on the 10th and 25th days of August then next: Breach, non-payment for the subsequent performances.

The declaration also contained a count for work and labour.

Plea,—non assumpsit.

The cause was tried before JERVIS, C. J., at the sittings at Westminster after the last term. The facts which appeared in evidence were as follows:—

In the year 1849, the defendant, who had made considerable advances of money to Mr. Delafield, the then lessee of the Royal Italian Opera House, Covent Garden, to secure which he had taken an assignment of everything that was available in and about the theatre, and assumed the management, issued placards announcing that he would not be responsible to the performers for arrears of salaries. A meeting was thereupon held in the green-room of the theatre, on the 9th of July. The plaintiff, who represented the members of the orchestra, came to the meeting with the following written memorandum:—

*741]

*“July 9th, 1849.

“The gentlemen of the orchestra of the Royal Italian Opera, Covent Garden, are willing, and hereby pledge themselves, to continue their services, and attend their duties, provided Mr. Beale will guaranty the payment of the thirteen nights due on the 15th ultimo.

(Signed, on behalf of the gentlemen of the orchestra),

“C. LUCAS.”

The defendant thereupon signed the following memorandum, which was drawn up by his solicitor:—

“July 9th, 1849.

“Mr. Beale will accept the proposition made by Mr. Lucas on behalf of the gentlemen of the orchestra; and he will appoint the treasury to be open on the 19th instant, to pay the thirteen nights due on the 5th instant; and he pledges himself to open the treasury on the 10th and 25th of August, to make further payments.

(Signed) “J. F. BEALE.”

The plaintiff and the other members of the orchestra performed for three nights after the 9th of July, when the defendant abandoned the management of the theatre, paying neither the arrears, nor for those three nights. The principal performers then took the theatre into their own hands.

On the part of the defendant, it was objected that the contract, as alleged and proved, was, a joint contract with all the members of the

orchestra, and that the action should have been brought in the names of all. For the plaintiff, it was submitted that it was either a separate contract with each, or made by Lucas as trustee for the whole.

In answer to questions put to them by the lord chief justice, the jury said that the contract was separate, and *signed by the plaintiff on his own behalf. His lordship offered to permit the declaration to be amended by so stating the contract. The counsel for the plaintiff, however, declined to amend. The chief justice thereupon directed a nonsuit.

Keating now moved for a new trial.—The contracting parties were Lucas and Beale. If this had been the case of a deed, there could have been no doubt that Lucas only could have sued. In *Metcalf v. Rycroft*, 6 M. & Selw. 75, it was held that covenant lay on a deed of composition with creditors, by one of two partners who signed the deed in the name of his firm, and set his seal thereto, for non-payment of an instalment due on a partnership debt: Lord ELLENBOROUGH saying,—“The defendant is an executing party, and he covenants to pay to the several parties, or their partners, and he has not done so. No other than one who is a party to the deed, can have a right to sue upon it.” The circumstance of this being an instrument not under seal, can make no difference in this respect. [JERVIS, C. J.—The signature by one, for self and partner, was excess of authority: the party signing, however, was liable for his own act. The consideration for this agreement is, that all the members of the orchestra shall continue to play for the season. Does Lucas pledge himself for each and all? or does each performer agree to be bound by Lucas’s signature? You must, I think, go the length of saying that an action would lie against Lucas upon this contract, if any member of the orchestra refused to play.] The plaintiff acted as agent or trustee for the band. CRESSWELL, J.—As which? As trustee. [CRESSWELL, J.—Trustee of what?] Of the fund, when received. [CRESSWELL, J.—There is no agreement to pay to him.] [*743 At all events, the plaintiff may maintain the action in *respect of his own share. [TALFOURD, J.—Not upon this declaration.] The opinion expressed by his lordship at the trial, that this was not a separate contract with each, made it useless to ask for an amendment. [JERVIS, C. J.—The truth is, that you went down expressly to try if Lucas could sue on behalf of the whole,—in order that you might satisfy the Lord Chancellor that you had no remedy but in equity.] It is submitted that it might be treated as the separate contract of each of the parties, if not as a contract with Lucas as trustee for the others.

CRESSWELL, J.—I am of opinion that there is no ground for disturbing the nonsuit. There was no contract by Lucas on behalf of himself and all the others; but a contract made by him as agent for them. What is now complained of, is, that the lord chief justice expressed an opinion which induced the plaintiff to abstain from asking for an amend-

ment. This differs from the ordinary case: the plaintiff designedly stated the contract as it now stands.

WILLIAMS, J.—I also think the nonsuit was right. It would be a dangerous thing to grant a new trial on the ground suggested, viz., that the opinion expressed by the judge made it inexpedient for the plaintiff to accept an amendment which was offered to him at the trial.

TALFOURD, J., concurred.

JERVIS, C. J.—I agree with the rest of the court in thinking that it would not be right to grant a new trial merely for the purpose of enabling the plaintiff to ask for an amendment. I think under the circumstances I should not have allowed it.

Rule refused.

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*TAPLIN v. FLORENCE. *April 25.*

An auctioneer who is employed to sell goods by public auction, has not such an interest as will make the license to enter the premises for that purpose irrevocable.

THIS was an action of trespass.

The declaration stated, that, on the 25th of May, 1850, the defendant assaulted the plaintiff, and seized and laid hold of him, and pushed, pulled, and dragged him about, he then being in certain rooms and premises (wherein he was then lawfully engaged in and about the sale and delivery of certain goods and chattels by him then sold by public auction, as, and being, an auctioneer, duly licensed, and authorized so to sell and deliver the same), and in the presence and hearing of certain persons then and there assembled as, and being, purchasers of divers of the said goods and chattels at such sale thereof by the plaintiff by auction, and of other good subjects of the realm, violently, and with great force, and many loud menaces, dragged him in, about, and along, and ejected and expelled him from and out of, the said rooms and premises, into the public street, and forced and obliged him to leave and go away from the said rooms and premises, and kept him expelled and ejected from the same, and thereby prevented him from continuing or proceeding with the sale and delivery of such goods and chattels as aforesaid, and from delivering such of the same as were sold, to the respective purchasers thereof, and receiving from them the purchase-moneys for the same, and caused them to suspect and suppose and believe that he, the plaintiff, was not duly authorized so to sell the said goods by auction as aforesaid, or that he was not a respectable or reputable or responsible person to be intrusted with the sale of, or to receive the purchase-

*745] *moneys for, the same; and that the plaintiff was thereby greatly exposed, and injured in his credit and reputation, and damaged in his business as an auctioneer, and thereby also became and was vexed by certain actions at law at the suit of divers of the said purchasers,

who instituted such suits at law against him for and on account of the non-delivery to them by him of such goods so sold by him to them as aforesaid, and so, and also otherwise, by means of the premises, the plaintiff had been put to great expenses, and lost divers moneys, and had been and was greatly injured in the way of his business as an auctioneer : and other wrongs, &c.

Second plea,—that the defendant, before and at the said time when, &c., was possessed of a certain building, counting-house, and premises, with the appurtenances, situate and being in the city of London, and, being so possessed thereof, the plaintiff, just before and at the said time when, &c., to wit, on the day and year aforesaid, was unlawfully in the said building, counting-house, and premises, to wit, in the said rooms and premises in the declaration mentioned, the same being in, and part and parcel of, the said building, counting-house, and premises thereinbefore mentioned; that the plaintiff was then, with force and arms, making a great noise and disturbance therein, without the leave or license, and against the will of the defendant; that thereupon, the defendant then requested the plaintiff to cease making the said noise and disturbance, and to depart from and out of the said building, counting-house, and premises, which the plaintiff then wholly refused to do; and that thereupon, the defendant, in defence of his said building, counting-house, and premises, gently laid his hands on the plaintiff, in order to remove, and did then remove and eject and expel him the plaintiff from and out of the said rooms and premises, so being in, and part and parcel of, the said building, counting-house, and premises of [*746 the defendant, and did then force and oblige the plaintiff to leave and go away from the said rooms and premises, and, in so doing, the defendant did necessarily and unavoidably a little push, pull, and drag about the plaintiff, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the alleged trespasses in the declaration mentioned,—verification.

Replication,—that, before and at the said time when, &c., in the declaration mentioned, and at the time of the retainer and agreement hereinafter next mentioned, the plaintiff was, and thence continually had been, and was, an auctioneer, duly licensed and authorized, according to the form of the statutes in such case made and provided, to sell goods and chattels by public auction, for reward and commission to him in that behalf payable; that, the plaintiff being such auctioneer, the defendant, before the said time when, &c., to wit, on the 2d of May, 1850, retained and employed him, the plaintiff, for reasonable remuneration and reward in that behalf, as such auctioneer as aforesaid, to sell by public auction, in and upon the said rooms and premises in the declaration mentioned, certain goods and chattels of the defendant then therein lying and being; that thereupon, and then, in consideration thereof, and that the plaintiff then, at the request of the defendant,

undertook and promised him so to sell the said goods on the said premises as aforesaid, and conduct and complete the said sale according to the common usage of sales by auction, and the common course of business in that behalf, the defendant then undertook and promised the plaintiff that he should and might so sell such goods as aforesaid by auction in and upon the said rooms and premises, and in and upon the said rooms and premises to come, be, and remain, so often and so long, and on such occasions, and for such purposes, as should be reasonable and requisite for such sale as aforesaid, and make such noise and disturbance therein as *747] should be necessary and unavoidable, in order to carry on and complete the said sale in and upon the said rooms and premises, according to such advertisements and public announcements as should be published and put forth respecting the said sale, and according to the usage of sales by auction, and the usual course of business in that behalf: That thereupon, and then, under and in pursuance of the said retainer and agreement, he, the plaintiff, did, forthwith, for the purpose of such sale, arrange, classify, and catalogue the said goods, and cause and procure catalogues thereof to be printed and distributed, and as was necessary in the usual course of business in that behalf; and that the plaintiff did cause and procure advertisements and announcements of the said sale to be, and the same were, with the knowledge, privity, and permission of the defendant, printed and published, in public newspapers, and by public handbills and placards, and therein did advertise and announce that he should sell such goods by auction in and on the said rooms and premises, on the 21st day of May, 1850, and the two following days; and that, in and about the doing of the premises, he, the plaintiff, did incur and expend and become liable for certain large sums of money, to wit, to the amount of 50l.,—the defendant well knowing the said several premises respectively: That, in the said advertisements, placards, and handbills, it was by the plaintiff announced and advertised, under and in pursuance of such retainer and agreement, and by such permission of the defendant as aforesaid, and according to the usual and regular course of business in such cases, that, within a reasonable time, to wit, before the 28th day of May aforesaid, after the said goods should have been set up for sale and sold by public auction as aforesaid, in and on the said rooms and premises, the respective purchasers of the said goods would have to clear and carry away the same *748] from such rooms and premises according to the usage of sales by auction: That afterwards, at and upon the day and year last aforesaid, he, the plaintiff, under and by virtue of such agreement and retainer as aforesaid, and according to such announcements as aforesaid, did, in and upon the said rooms and premises, sell the said goods by auction to divers persons, whose names were to him unknown, who then purchased the same respectively of and from him, the plaintiff, as such auctioneer as aforesaid, and thereupon then became and were the owners

thereof: That thereupon and then it became and was his duty, as such auctioneer, to deliver the said goods to the said purchasers thereof respectively, upon receiving from them the purchase-moneys for the same; and that thereupon and then, within a reasonable time in that behalf, and according to the usage of sales by auction, and the usual course of business in that behalf, and under and in pursuance of such retainer and agreement as aforesaid, and in accordance with such announcements and advertisements as aforesaid, and at the said time when, &c., in the declaration mentioned, he, the plaintiff, along with divers of the said persons so purchasers as aforesaid, was and were present and assembled in and upon the said rooms and premises for the purpose of completing and closing the said sale by auction, he, the plaintiff, being then and there ready and willing to, and being there in order to, deliver the said goods respectively to the persons who had so purchased the same respectively, upon receiving from them the purchase-moneys payable for such goods respectively, and they the said persons being ready and willing to, and then and there assembled and present in order to, pay such purchase-moneys to him, the plaintiff, and from him to receive and forthwith clear off and carry away from the said rooms and premises, the said goods so sold to them as aforesaid: That, by reason of the premises, there was necessarily *some noise and disturbance in and upon [749 the said rooms and premises, but that the plaintiff made and caused no more than was necessary and unavoidable by reason of the premises before mentioned,—of all which the defendant, before and at the time of such request as in the plea mentioned, had full knowledge: That the request of the defendant mentioned in the plea, was, a request to him, the plaintiff, to cease from making such noise and disturbance as was necessary and unavoidable in order so to complete the said sale as aforesaid, and so to deliver the said goods and receive the said moneys as aforesaid, and to depart from the said rooms and premises before he should or could have completed the said sale as aforesaid, or delivered the said goods on receipt of the said purchase-moneys thereof respectively as aforesaid; and that therefore, and in accordance therewith, and not otherwise, he, the plaintiff, refused so to cease from the said noise, or so to depart from the said premises, as he lawfully might refuse, for the cause aforesaid: That he, the plaintiff, no otherwise refused to cease from making noise or disturbance, or to depart from the said house, rooms, or premises, except as aforesaid, and was ready and willing, and offered, forthwith and immediately, and as soon as reasonable and possible so to complete the said sale, and to deliver the said goods, and cause the same to be cleared off and carried away from the said rooms and premises as aforesaid, and was also then and there ready and willing to depart from the said rooms and premises so soon as the said goods should have been so delivered and cleared off as aforesaid, and so soon as the said sale shall have been so completed, according to the

said retainer, agreement, and advertisements as aforesaid, and then and there requested the defendant to permit him to remain a reasonable and requisite time for the purpose of so completing the said sale as aforesaid, which the defendant, although having full knowledge of *750] *the said several premises, wholly and wrongfully refused to do, contrary to his said retainer and agreement as aforesaid; and that thereupon, and then, immediately, and before a reasonable time for the plaintiff so to complete the said sale as aforesaid, or for the defendant to make such request as aforesaid, or for him to comply with the said request of the defendant, or for the defendant to remove or eject or expel the plaintiff from the said rooms and premises, had respectively elapsed, and while the plaintiff was so as aforesaid employed, under and in pursuance of such retainer and agreement as aforesaid, in completing the said sale, to wit, at the said time when, &c., in the declaration mentioned, the defendant, having full knowledge of the premises, wrongfully and with force and arms assaulted the plaintiff, and seized and dragged him in, about, and out of the said rooms and premises, and forced him from the same into the streets in the declaration mentioned,—verification.

Rejoinder,—that, before the said time when, &c., and whilst the plaintiff was in and upon the said rooms and premises for the purpose in the replication mentioned, and before the making of the said request in the plea mentioned, and before the completion of the said sale, to wit, on the day and year in the declaration mentioned, he, the defendant, revoked, determined, recalled, and put an end to his, the defendant's, license to the plaintiff to remain on or come into the said rooms and premises, for the purpose in the replication mentioned, or for any other purpose whatsoever, and then determined and put an end to the plaintiff's authority, as such auctioneer, or otherwise, to remain and be in or upon the said rooms and premises for the purpose in the replication mentioned, or for any other purpose; and that the plaintiff, afterwards, and just before the said time when, &c., to wit, on the day and year aforesaid, without the leave and license, and against the will of the defendant, with force *and arms, remained in and upon the said rooms *751] and premises, and was there making the said noise and disturbance in the plea mentioned, being other and different noise and disturbance than as in the replication mentioned; and that the request in that plea mentioned, was a request to the plaintiff to cease making the unlawful noise and disturbance in the plea mentioned, and to depart from and out of the said rooms and premises, as in the last plea mentioned, and was not a request to the plaintiff to cease making the said noise and disturbance as in the replication mentioned; and that therefore the defendant, in defence of the possession of his said rooms and premises, committed the alleged trespasses in the declaration mentioned, as he lawfully might, for the cause aforesaid,—verification.

Surrejoinder,—that, under and by virtue of the said retainer and agreement and promise in the replication mentioned, and not otherwise, he, the plaintiff, was employed and authorized, as such auctioneer as aforesaid, so to sell the said goods in the replication mentioned in and upon the said rooms and premises in the said plea and replication mentioned, as in the said replication set forth and specified; and by the said promise, he, the plaintiff, did not agree that the same, or the retainer of the plaintiff, should be, nor by or according to the said agreement or promise could the same, or the said retainer of the plaintiff as such auctioneer as aforesaid, be, rightfully or lawfully, revoked, rescinded, determined, or put an end to, without the consent and will of both parties to the said agreement, nor after the same had been executed, or the said goods put up for sale and so sold by auction by him, the plaintiff, as aforesaid: That he, the plaintiff, never did consent nor be a party to any revocation, rescission, or determination of the said agreement, nor agree to the same or to the said retainer being revoked, rescinded, recalled, or put an end to, nor was *there, nor had there been, before [*752 or at the time when the defendant made such request as in the said plea and replication mentioned, any agreement between the defendant and the plaintiff for the said agreement or the said retainer being revoked, rescinded, or determined; and that the same until and at and after the time of the said request, and of the said demand and refusal and assault and expulsion thereafter mentioned, and of the said supposed revocation in the rejoinder mentioned, and of the trespasses in the declaration mentioned, remained, as the defendant then well knew, unrescinded and undetermined, and in full force and effect: That, while the said agreement and retainer were so in full force and effect as aforesaid, he, the plaintiff, under and by virtue of, and according to, the same, and as such auctioneer as aforesaid, before the said supposed revocation in the said rejoinder mentioned, put up for sale, and sold by auction, and according to the said agreement and the usage of sales by auction, in and upon the said rooms and premises in the declaration, plea, replication, and rejoinder respectively mentioned, the said goods therein mentioned, in divers lots, to certain persons whose names he the plaintiff is now unable to specify, for certain sums of money respectively, part of which they the said purchasers respectively then deposited with and paid to the plaintiff as such auctioneer as aforesaid, and the said several lots of goods then became and were respectively the property of the said persons to whom the same had been so sold, and who had so purchased the same respectively,—of all which said several premises the defendant then, and at the time of such supposed revocation in the said rejoinder mentioned, and of the said request in the said replication mentioned, had notice and knowledge: That thereupon and then, before and at the time of the said supposed revocation, and of the said request, it became and was the duty of the plaintiff, as such

*753] *auctioneer as aforesaid, and was according to the usage of sales by auction, that he should deliver the same lots respectively to the said purchasers thereof respectively, upon their paying to him the residue of the said sums of money for the same respectively; and that he the plaintiff should be, and he accordingly was, at a reasonable time in that behalf, and before and at the time of the said supposed revocation, and of the request hereinafter next mentioned, in and upon the said rooms and premises for the purpose of his so delivering to the said persons the said lots respectively, on receiving from them the said moneys for the same respectively, and divers of the said persons were then and there present to receive from him the said lots of goods respectively, upon so paying him the said moneys for the same respectively as aforesaid; and, by reason thereof, the plaintiff was then and there making a little noise and disturbance, but not more than was necessary and unavoidable, for the reasons and purposes aforesaid; and he the plaintiff was not in and upon the said rooms and premises, nor making any noise or disturbance therein, for any other purpose whatsoever, save as aforesaid,—of all which the defendant then had knowledge: That thereupon and then, after the plaintiff, as such auctioneer, had sold the said goods as aforesaid, and while he was present in and upon the said rooms and premises for the purpose of so delivering the same as aforesaid, and when he was about so to deliver them as aforesaid, and before a reasonable time for him so to deliver, or receive the moneys for, the said goods as aforesaid had elapsed, and before the said sum had been or could be so delivered or paid for, and while the said persons to whom the same had been sold as aforesaid were waiting to receive the same, and demanding of the plaintiff, as such auctioneer as aforesaid, to deliver the same respectively to them, the defendant suddenly, and wrongfully and *754] unreasonably, and without any notice or *reasonable cause or excuse whatever, demanded of the plaintiff to desist from so delivering the said goods as aforesaid, and immediately, and before he could deliver the same as aforesaid, to depart from the said rooms and premises (contrary to his duty as such auctioneer as aforesaid), which the plaintiff refused to do, as he lawfully might for the cause aforesaid: That thereupon and then immediately, and before a reasonable time for the defendant to request him the plaintiff so to desist and depart as aforesaid had arrived or elapsed, the defendant, with force and arms, assaulted the plaintiff, and compelled him to desist and depart, and expelled him from the said rooms and premises as in the replication and in the declaration alleged: That, until and at the respective times of the said request, and of the said supposed revocation, and of the said expulsion and assault, and of the trespasses, in the declaration mentioned, the said agreement hereinafter and in the said replication mentioned, remained in full force and unrescinded; and that the said noise and disturbance in the said plea mentioned was made while such agree-

ment was in full force, unrescinded, and undetermined, and after the said goods had been sold under the same; and that the defendant not otherwise, nor in any other manner, nor at any other time, than as aforesaid, revoked, or recalled, or determined any leave or license to him the plaintiff to remain in the said rooms and premises; and that he the plaintiff never had any notice, knowledge, or intimation, or reason to understand or suppose, that the defendant intended to revoke or determine such agreement or retainer as aforesaid: And that the said supposed revocation in the rejoinder mentioned, was in fact such sudden, summary, wrongful, and unreasonable demand of the defendant as aforesaid, that the plaintiff should instantly and immediately desist and depart as aforesaid,—verification.

*Special demurrer, assigning for causes,—that, although the said surrejoinder is pleaded by way of confession and avoidance, [*755 yet it states no facts or matter avoiding the matter pleaded in the rejoinder, and the matters pleaded are no answer in law to the said rejoinder;—that the surrejoinder attempts to state and plead mere conclusions and deductions of law, viz. as to the construction of the said agreement in the replication mentioned, and the rights of the parties under it;—that the surrejoinder attempts to plead mere consequences of facts, which the defendant can neither deny, admit, or confess, or plead over to;—that the surrejoinder, although it professes to be by way of confession and avoidance, amounts to an argumentative denial of the revocation of the license and authority to the plaintiff, as alleged in the replication;—that the surrejoinder attempts to plead much insensible and irrelevant matter, inasmuch as, although it is pleaded by way of confession, and therefore admits the revocation of the license to the plaintiff as alleged in the replication, yet states, that at the time of the said supposed revocation, the said license and authority remained unrevoked and undetermined;—that the surrejoinder admits that the said license was revoked, and yet attempts to say that the plaintiff was justified in remaining on the said rooms and premises against the will of the defendant, because he was an auctioneer, having a right so to do by reason of some supposed usage of sales by auction, and attempts to set up such supposed usage as controlling the common law of the land;—that the surrejoinder admits, that, before the time when, &c., the defendant demanded of the plaintiff to desist from delivering the said goods, and immediately to depart from the said rooms and premises, which was a revocation of the license of the plaintiff to be there, and therefore, on the face of the surrejoinder itself, it is admitted that the defendant was justified in assaulting the plaintiff, and in turning him out of the said *rooms, as alleged in the said second plea and rejoinder;—that [*756 the surrejoinder admits that the said license arising from the said agreement in the replication mentioned was put an end to and determined before the defendant assaulted and put the plaintiff out of the

said rooms and premises, yet shows no sufficient cause for his, the plaintiff's, refusing to cease making the noise and disturbance in the plea and rejoinder mentioned, except that it is merely stated that the defendant suddenly, wrongfully, unreasonably, summarily, and without notice, determined and revoked the said license;—and that the surrejoinder is double, in this, to wit, that it argumentatively denies the revocation of the license as alleged in the rejoinder, at the same time that it attempts insufficiently to justify the plaintiff's refusal to desist from making the said noise, and to depart from the said rooms and premises.

Joinder in demurrer.

W. H. Watson (with whom was *Manisty*), in support of the demurrer. (a)—The real question in this case, is, *whether the license to the plaintiff to enter upon the defendant's premises for the purpose of selling the goods, was or was not revocable. In *Wood v. Lead-bitter*, 13 M. & W. 838,† it was held, that a parol license to come and remain for a certain time on the land of another, though money be paid for it, is revocable at any time, and without paying back the money. That was an action of trespass for assault and false imprisonment: the defendant pleaded, that, at the time of the supposed trespass, the plaintiff was in a close of Lord Eglintoun, and that the defendant, as the servant of Lord Eglintoun, and by his command, *molliter manus imposuit* on the plaintiff to remove him from the close, which was the trespass complained of: the plaintiff replied that he was in the close by the leave and license of Lord Eglintoun; which was traversed by the rejoinder. The evidence was, that Lord Eglintoun was steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the enclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the enclosure during the races; that the defendant, by the order of Lord Eglintoun, desired him to leave it, and, on his refusing to do so, the defendant, after a reason-

(a) The points marked for argument on the part of the defendant, were,—

"1. That the alleged trespass is justified by the defendant's special plea, which shows that the plaintiff was unlawfully on the defendant's premises, making a noise and disturbance, and that, after being requested to depart, he refused to do so, whereupon the defendant, as he lawfully might, turned him out, and, in so doing, committed the alleged assault:

"2. That the plaintiff's replication furnishes no answer in law to the plea, but that, on the contrary, it supports the plea, seeing that it admits a revocation in fact of the leave and license on which the plaintiff relies in his replication, and seeks (but unsuccessfully) to show that such revocation was in point of law inoperative:

"3. That, if the replication be in law a *prima facie* answer to the plea, then that the rejoinder is a good answer to the replication, inasmuch as it not only distinctly alleges a revocation of the leave and license relied upon by the plaintiff in his replication, but also shows that the plaintiff was making a noise and disturbance (other than the noise and disturbance mentioned in the replication) which justified the defendant in turning him off his premises, as stated in the plea and rejoinder.

"4. That the surrejoinder is bad in form, for the reasons pointed out in the special demurrer; and that it is bad in substance, seeing that it does not deny either the revocation of the leave and license relied upon by the plaintiff in his replication, or the fact that the plaintiff was making the unjustifiable noise and disturbance upon the defendant's premises, which is mentioned in the rejoinder."

able time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea. And it was held, that, upon this evidence, the jury were properly directed to find the *issue for the defendant. The whole law upon the subject of licenses, [*758 is there elaborately discussed in a very learned judgment delivered by ALDERSON, B. [JERVIS, C. J.—In *Wood v. Manley*, 11 Ad. & E. 84 (E. C. L. R. vol. 39), 3 P. & D. 5, hay which was upon the plaintiff's land was sold to the defendant: by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the hay: and it was held, that, after the sale, the plaintiff could not countermand the license.] There, the license was irrevocable. ALDERSON, B., observes upon that case in *Wood v. Leadbitter*, where he says: (a) "This was a case, not of a mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer put by C. J. VAUGHAN, (b) irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land; in which case, I am justified in going on the land and removing them: Vin. Abr. *Trespass* (H. a. 2), pl. 12, and *Patrick v. Colerick*, 3 M. & W. 483."† A license of the nature here set up, could only properly be granted *by deed*: *Hewlins v. Shippam*, 5 B. & C. 221 (E. C. L. R. vol. 11), 7 D. & R. 788 (E. C. L. R. vol. 16); *Bryan v. Whistler*, 8 B. & C. 288 (E. C. L. R. vol. 15), 2 M. & R. 318. [WILLIAMS, J.—The authorities were very fully gone into in *Smart v. Sanders*, 5 Com. B. 895, 917 (E. C. L. R. vol. 57), where the late lord chief justice, in a very able judgment, says: "The result appears to be, that, where an agreement is entered into, on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by *an authority coupled with an interest, and which is commonly said to be irrevocable." [*759] All that occurs here, is an employment by the defendant of the plaintiff as an auctioneer. [JERVIS, C. J.—This is a mere excuse for a trespass. WILLIAMS, J.—The plaintiff says that the license is irrevocable, because, acting upon the faith of it, he issued advertisements and placards announcing the sale, and so has incurred expense in the partial execution of the agreement.] It may be that the defendant is liable to an action of some sort for not permitting the plaintiff to go on with the sale; but clearly *this* action cannot be maintained. In *Adams v. Andrews*, 20 Law Journ. N. S., Q. B. 83, it was held, that a parol license to the defendant and others to enter the plaintiff's pew in a parish church, might be revoked.

Lydekker (with whom was *Peacock*), contra. (c)—*Adams v. Andrews*

(a) 13 M. & W. 853.†

(b) In *Thomas v. Sorrell*, Vaughan, 351.

(c) The points marked for argument on the part of the plaintiff, were,—

"That the effect of the pleadings is, that, while the plaintiff was engaged in delivering goods

proceeded upon the ground that the license had relation to an incorporeal hereditament, and therefore could only be by deed. An auctioneer has a special property in goods which are intrusted to him for sale. In *Williams v. Millington*, 1 H. Blac. 81, it was held, that an auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such *third person, and the goods were known *760] to be *his* property. "I entertain no sort of doubt," said Lord LOUGHBOROUGH, "on the general question being extremely clear, that an auctioneer has a possession, *coupled with an interest*, in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference, whether the sale be on the premises of the owner, or in a public auction-room; for, on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction-duty, which he is bound to pay." That case was recognised and confirmed in the recent case of *Davis v. Danks*, 3 Exch. 435.† PARKE, B., in that case says: "There is no doubt as to the law, that an auctioneer has a special property, as bailee, in goods and chattels which are put into his possession for the purpose of sale, whether such goods and chattels be in his own rooms or in the house of another person. The case of *Williams v. Millington* is a decision to that effect." It is clear, therefore, that the plaintiff had an interest and a special property in the goods; consequently, the license to him to enter upon the premises to complete the sale which he had begun, was a license coupled with an interest, and irrevocable. [JERVIS, C. J.—The license is, a license to enter on the premises. Do you mean to contend that the auctioneer has an interest in the premises? A mere special property in goods does not give a man a right to enter upon my premises to take them.] He had a special property in the goods, and a right to the possession of them, the manual possession of them being necessary to enable him to perform duties *761] towards *the vendees, which he had undertaken at the instance of the owner of the premises. [WILLIAMS, J.—If the defendant has broken his agreement, the plaintiff may have a remedy against him: but the question is, whether the plaintiff had a right to be upon the premises after the defendant had revoked his license.] The plaintiff was not in under a mere license, but under an agreement. His right of

to persons to whom he had lawfully sold them by auction under authority from the defendant, the defendant suddenly desired him to withdraw, and on his declining so to do until he had completed the delivery of the goods, immediately expelled him by force: that such request and expulsion were unreasonable, unjustifiable, and unlawful. In substance the argument for the plaintiff will be that it appears he was lawfully present; and the utmost the defendant alleges, is, that the plaintiff was there at the time of the expulsion, against the will and without the consent of the defendant."

possession was somewhat in the nature of a grant. In *Edwards v. Chapman*, 1 M. & W. 231,† to assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered upon a certain contract, and that afterwards it was agreed between the plaintiff and defendant that the contract should be wholly rescinded and annulled: and the plea was held bad; PARKE, B., saying,—“A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction.” [JERVIS, C. J.—Do you say, that, when a man once employs an auctioneer, he *must* sell his goods,—he cannot stop?] It is not necessary to contend for that. The goods being sold, the defendant could not, by withdrawing the license, intercept their delivery.

Watson, in reply.—*Davis v. Danks* is an authority for the defendant. PARKE, B., there says: “On the ground that he (the auctioneer) is a bailee, he may maintain trespass *de bonis asportatis*, or trover, for such chattels. But, is he bailee of the roof of the house, which is part of the freehold? He cannot be considered to have such a possession of the house and fixtures as would entitle him to maintain an action of trespass *quare clausum fregit* against a party for an injury to them; and that is conceded to be so by the plaintiff’s counsel.” This is like any other case of contract.

JERVIS, C. J.—I am of opinion that the defendant in *this case is entitled to the judgment of the court. The action in substance [*762 is for an assault and expulsion of the plaintiff from the premises of the defendant. The defendant justifies the act complained of, on the ground that the plaintiff was making a noise and disturbance on his premises, and refused to depart when requested. The plaintiff replies, that he was employed as an auctioneer, by the defendant, to sell certain goods of the defendant upon the premises in question, and entered upon the premises for that purpose by the license and permission of the defendant. The defendant rejoins, that, before the completion of the sale, he revoked his license to the plaintiff to remain or come into the premises. But, says the plaintiff in his surrejoinder, before the defendant revoked his license, I had incurred expense in preparing for the sale, and therefore he had no right to revoke. The question, therefore, is, whether, under the circumstances stated in this record, the defendant was justified in revoking the license. The plaintiff puts his right to maintain the action upon two grounds,—first, he says, he was upon the premises under a license from the defendant, which, being coupled with an interest, was irrevocable,—secondly, that he was there under an agreement with the defendant, which could only be put an end to by their mutual consent. Now, this second ground rests upon an agreement which, being by parol, confers no interest in the land: that ground therefore fails as an answer to the defence. The question then resolves itself into this, whether this was a license coupled with an interest. What is the sort of interest that

must be conferred in order to make a license irrevocable? This is no where better illustrated than in the passage from C. J. VAUGHAN'S judgment in *Thomas v. Sorrell*, Vaughan, 830, 851, 1 Lev. 217, 3 Keb. 223, cited by ALDERSON, B., in *Wood v. *Leadbitter*, 18 M. & W. *763] 844 :†—"A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As, a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but, as to the carrying away of the deer killed, and tree cut down, they are *grants*. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are *licenses*; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt, so as in some cases by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property." In *Wood v. Manley*, 11 Ad. & E. 84 (E. C. L. R. vol. 39), 3 P. & D. 5, as PATERSON, J., observes, "the license is part of the very contract." The interest which is to confer an irrevocable license, must be an interest in the thing to which the license extends. It is not pretended here that the plaintiff had an interest in the premises, so as to bring the case within the analogy of the deer or the tree in the case put by Chief Justice VAUGHAN. Further, it is said that the plaintiff had a special property in the goods; and that, his goods being upon the premises of the defendant, he had a right to enter for the purpose of removing them. There is no authority whatever for that position. What are the facts? The goods had always remained the property, and in the possession, of the defendant. The *764] plaintiff was employed for a specific *purpose, viz., to sell the goods by auction upon the premises. I think, therefore, the plaintiff has failed to make out the proposition he must establish, to entitle him to maintain this action, viz., that he had an interest in the subject-matter of the agreement. And, his authority to enter being revoked (and, as he had no interest in the premises, it was clearly revocable), his justification for remaining there entirely failed. In thus deciding, we do not in any degree infringe upon the case of *Williams v. Millington*, 1 H. Blac. 81, which establishes a well-recognised principle, viz., that an auctioneer has a special property in goods which he is employed to sell, and may maintain an action for goods sold and delivered against a buyer; though it is equally clear, that, if the owner of the goods chooses to revoke that authority, and gives notice of such revocation to the vendee, he also may maintain an action for the price. I am

therefore of opinion that this demurrer must prevail, and that the defendant must have judgment.

CRESSWELL, J.—I am entirely of the same opinion. It is clear that an auctioneer who is employed to sell goods upon the premises of a third party, has no such interest in the goods as will make the license to enter the premises for the purpose of selling the goods irrevocable. The fact of his having incurred expense certainly can have no such effect. According to *Wood v. Leadbitter*, 13 M. & W. 838,† and *Smart v. Sandars*, 5 Com. B. 895 (E. C. L. R. vol. 57), a mere parol license may be revoked at any time. Such a license, to be operative at all, must be by deed: *Hewlins v. Shippam*, 5 B. & C. 221 (E. C. L. R. vol. 11), 7 D. & R. 783 (E. C. L. R. vol. 16), *Bryan v. Whistler*, 8 B. & C. 288 (E. C. L. R. vol. 15), 2 M. & B. 318 (E. C. L. R. vol. 17).

WILLIAMS, J.—I am of the same opinion. The *substance of [765 the defence is, that the plaintiff was upon the premises making a noise and disturbance after his license to be thereon was revoked. I know of nothing to prevent the revocation of a license of this kind. It is not a license coupled with an interest, within the meaning of that phrase in any of the cases.

TALFOURD, J., concurred.

Judgment for the defendant.

COLBOURN and Others v. DAWSON. April 29.

A. & Co. write to B., "We are doing business with C., and we require a guarantee to the amount of 200*l.*, and he refers us to you for one." B. replies, "In reply to yours, I beg to say that I have no objection to become security for C., and subjoin the following memorandum to that effect." The subjoined memorandum was,—"*I hereby engage to guaranty to A. & Co. the sum of 200*l.*, for iron received from them for C. as annexed:*"—Held, a good consideration to support an assumpsit.

Seemle, that, if necessary, evidence was admissible to explain the meaning of the words "for iron received."

A declaration upon this guarantee stated, that, in consideration that the plaintiffs, at the request of the defendants, would sell and deliver iron to C. on credit, the defendant promised the plaintiffs to guaranty to them the price of the said goods to the amount of 200*l.*:—Held, that the consideration and the promise were well laid.

THIS was an action of assumpsit to recover 200*l.*, and interest thereon, being the sum alleged to be due to the plaintiffs on a certain guarantee of the defendant hereinafter set out.

The declaration contained the following special count: "For that heretofore, and before the commencement of this suit, to wit, on the 27th of November, 1848, in consideration that the plaintiffs, at the request of the defendant, would sell and deliver certain goods and chattels, to wit, 1000 tons of iron, to one Joseph Ivey Baker and one William Bennet Baker, on certain credit then agreed upon by and between the plaintiff and the said Joseph Ivey Baker and William Bennet Baker, *the defendant then promised the plaintiffs to [766

guaranty to them the price of the said goods and chattels, to the amount of 200*l.*: And the plaintiffs aver, that, although they, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, sell and deliver to the said Joseph Ivey Baker and William Bennet Baker certain goods and chattels, to wit, 1000 tons of iron, on the credit aforesaid, at and for a certain reasonable price, amounting, to wit, to the sum of 200*l.*,—of which said several premises the defendant then had notice; and although the said credit and time for payment of the said price of the said goods and chattels had elapsed before the commencement of this suit, to wit, on the 21st of June, 1849; and although the said Joseph Ivey Baker and William Bennet Baker were afterwards, to wit, on the day and year last aforesaid, requested by the plaintiffs to pay them the said sum of 200*l.*; and although the said Joseph Ivey Baker and William Bennet Baker have not paid the said sum of 200*l.*, or any part thereof,—of which said last-mentioned several premises the defendant, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of 200*l.*; yet the defendant had not paid the said sum of 200*l.*, or any part thereof," &c.

The declaration also contained a count upon an account stated.

The defendant pleaded,—first, non assumpsit,—secondly, to the first count, that the plaintiff did not sell and deliver the goods, or any part thereof, to Joseph Ivey Baker and William Bennet Baker, as in the first count alleged,—thirdly, to the first count, payment by Joseph Ivey Baker and William Bennet Baker, and acceptance by the plaintiffs, of 200*l.*, before action brought, in full satisfaction and discharge of the cause of action in the first count mentioned.

*767] *Upon these pleas issues were joined.

The cause came on for trial before Lord CAMPBELL, at the last Summer assizes for the county of Gloucester, when a verdict was entered for the plaintiffs for 92*l.*, subject to the opinion of the court on the following case:—

On the 24th of November, 1848, Messrs. Baker & Co. were indebted to the plaintiffs in the sum of 59*l.* 8*s.* 7*d.*, for certain quantities of iron before then sold and delivered by them to Messrs. Baker & Co., between the 11th of October, 1848, and the 24th of November, 1848. On the last-mentioned day, the plaintiffs wrote to the defendant the following letter:—

“Bankfield Iron Works, Bilston.

“Mr. Thomas Dawson,

“Sir,—We are doing business with Messrs. Baker & Co., of St. John Street, Wolverhampton, and we require a guarantee to the amount of 200*l.*; and they refer us to you for one. Trusting you will not fail to furnish us,

(Signed)

COLBOURN, GROWCUTT & TURLEYS,

“24th November, 1848.”

To this letter, the defendant replied, on the 27th of the same month, by sending a letter and document, of which the following is a copy:—

“Midland Railway Engineers’ Office,
Derby, Nov. 27th, 1848.

“Gentlemen,—In reply to yours of the 24th instant, I beg to say that I have no objection to become security for Messrs. Baker & Co., of St. John Street, Wolverhampton; and subjoin the following memorandum to that effect:—

“200*l*.

“I hereby engage to guaranty to Messrs. Colbourn, Growcutt & Tarleys, iron-masters, the sum of 200*l*., *for iron received from [*768 them for Messrs. Baker & Co., as annexed.

(Signed)

“THOMAS DAWSON.”

After the receipt of the foregoing letter and statement, the plaintiffs supplied Messrs. Baker & Co., at various times, with iron, amounting in the whole to 92*l*. The last delivery was on the 5th of February, 1849.

The plaintiffs would not have supplied Messrs. Baker & Co. with any iron after the 27th of November, 1848, if they had not had what they believed to be a good guarantee in law from the defendant for the sum of 200*l*.; and the iron sold and delivered to Baker & Co., after the 27th of November, 1848, was so sold and delivered upon the faith of the letter and document sent by the defendant to the plaintiffs on that day being a good guarantee in law for the debt of Messrs. Baker & Co., to the extent of 200*l*.

After the 5th of February, 1849, when the last delivery of iron was made, and before the commencement of this action, Messrs. Baker & Co. became bankrupts. At the time of commencing the action, the sum of 124*l*. was still due from Messrs. Baker & Co. for the iron so sold by the plaintiffs to them.

If the court should be of opinion that the letter and document of the defendant, signed by the defendant, and dated the 27th of November, 1848, constituted a guarantee for so much of the debt of Messrs. Baker & Co. as was incurred after the 27th of November, 1848, and that they proved the first issue, then the verdict for the plaintiffs for the sum of 92*l*. was to stand.

If the court should be of opinion that the said letter and document did not constitute a guarantee for the debt of Messrs. Baker & Co., or did not prove the first issue, then the verdict was to be entered for the defendant.

**Keating* (with whom was *Kettle*), for the plaintiffs.(a)—The [*769

(a) The points marked for argument on the part of the plaintiffs, were,—“That it sufficiently appears that the consideration for which the guarantee is given, is an executory consideration to the effect stated in the first issue; that the guarantee is so ambiguous on the face of it, that evidence is admissible to explain it, and establish its validity; and that the evidence set forth in the case sufficiently explains the meaning of the said guarantee, and establishes its validity.”

question is how far the guarantee set out in the case is a good guarantee, corresponding to the statement thereof in the declaration. Its terms are a little ambiguous: but enough appears upon the face of it to show that it was intended to be a prospective guarantee; and the plaintiffs can only recover upon this declaration, as framed, in respect of prospective deliveries of iron. In the case of *Haigh v. Brooks*, 10 Ad. & E. 309 (E. C. L. R. vol. 37), 2 P. & D. 477, 3 P. & D. 452, the defendant gave the plaintiffs a guarantee in these terms:—"Messrs. H. In consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf:" and it was held, by the court of error, that this guarantee did not necessarily imply a past advance, and that the plaintiffs, on a trial, might have offered evidence to show that future advances had been contemplated. [CRESSWELL, J.—The decision in that case was, that the giving up of that guarantee was a good consideration for a subsequent promise.] The judgment could only have been in the terms it is, consistently with the instrument's being a prospective guarantee. In *Goldshede v. Swan*, 1 Exch. 154,† the guarantee was in these words,—“In consideration of your *having this day advanced* to our client, Mr. V. D., 750*l.*, secured by his warrant of attorney payable on the 22d of August next, we hereby jointly and severally undertake *770] to pay the same on default, &c. Dated the 20th of June, *1840:" and it was held, that the instrument was sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee. [JERVIS, C. J.—That is stronger than any of the cases.] Butcher v. Steuart, 11 M. & W. 857,† is almost identical with it: the words of the guarantee there were,—“In consideration of your *having released* the above-named defendant from custody, I hereby engage," &c.; and it was held that this agreement might be read to be, as it really was, prospective. So, in *Steele v. Hoe*, 19 Law Journ., N. S., Q. B., 89, where the guarantee was as follows,—“In consideration of your *having resigned* the office of deacon, and your connexion with the Baptist church and congregation at Clapham, I hereby agree to hold myself responsible to you for the payment of the sum of 150*l.* due to the Rev. J. E. by the Baptist church at Clapham, and also the interest for the same, at, &c., being the residue of the sum of 700*l.* principal and interest remaining unpaid, for which you and Mr. P. M., deacons of the said church, became responsible to the Rev. J. E. by an instrument bearing date," &c.,—was held to express a concurrent consideration. PATTESON, J., in delivering the judgment of the court, there says: “We think that the words, in their ordinary acceptation, are capable of expressing a past or a concurrent consideration: and as, upon one construction, the instrument is void, the other is to be adopted, which makes it valid. The expression that a promise is founded upon a consideration, conveys the notion that the

consideration precedes the promise in the mind of the party making the promise. He promises because the consideration exists; and this form of expression is shown by the authorities to have been frequently *received when the consideration and promise are concurrent. [*771 Each side of a contract is considered a promise, according to the particular party speaking of it; and, if each party were to put into writing his own promise, each side of the contract would in turn appear to have preceded the other, though both formed one agreement. The plaintiff might write, 'You having guaranteed, I resign;' and the defendant, 'You having resigned, I guaranty.' So are the authorities." The principle which ought to govern these instruments is well defined by ALDERSON, B., in *Mayer v. Isaac*, 6 M. & W. 605, 612.†

Crompton (with whom was *Gray*), contra.(a)—This guarantee relates to goods which have already been received,—possibly also to what were received at the time,—but certainly not to future supplies. [CRESSWELL, J.—If the letter of application showed that future dealings between the plaintiffs and Baker & Co. were contemplated, you would construe the word "received" as future, would you not?] If the whole formed one instrument, undoubtedly. [CRESSWELL, J.—I take the guarantee to apply to the previous letter asking for it. JERVIS, C. J.—The language of the defendant's letter and of the guarantee sufficiently connect them.] The documents declared on in *Butcher v. Steuart* and *Goldshede v. Swan*, were not inconsistent with the giving of the consideration and the execution of the guarantee being simultaneous acts. The doctrine of those cases is well explained in *Steele v. Hoe*. The court will not say that this guarantee *can* only apply to future supplies,—*which is [*772 all the plaintiffs can recover for on this declaration. The promise alleged is, to pay 200*l.* for goods thereafter to be furnished, not for what had been supplied before. [WILLIAMS, J.—Suppose the parties had met, and agreed that *no* goods had been supplied,—do you say that then the consideration would have been a *past* consideration?] That is not this case. [CRESSWELL, J.—The defendant says, I will guaranty the subsequent supply, and also the former supply, to the extent of 200*l.*] That is not quite what the defendant has said. The contract alleged in the declaration is, that, if the plaintiffs will go on supplying goods (there having been goods sold before), the defendant will guaranty both under a certain limit, but not either the one or the other to that extent. [WILLIAMS, J.—The consideration is sufficiently express: but the difficulty is, as to the promise, which must be in writing.] *Bentham v. Cooper*, 5 M. & W. 621,† is very analogous to the present case. [CRESSWELL, J.—Where do you find any *past* consideration here for the defendant's promise?] Not a *past* consideration, but a consideration as to

(a) The points marked for argument on the part of the defendant, were,—“that, the consideration for which the guarantee is given being executed, there is no good or valid consideration for such guarantee; and that, the guarantee not being ambiguous on the face of it, but being a complete guarantee, no evidence is admissible to explain it.”

past deliveries of goods. To sustain this declaration, both the promise and the consideration must be future. In *Bell v. Welch*, 9 Com. B. 154 (E. C. L. R. vol. 68), the defendant gave the plaintiff the following guarantee:—"We, the undersigned, hereby indemnify the National Provincial Banking Company, to the extent of 1000*l.*, advanced or to be advanced to R. P., by the said company." It appeared, that, at the time the guarantee was given, R. P. was indebted to the bank in a sum exceeding 1000*l.*: and it was held, that the guarantee did not, upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration. [WILLIAMS, J.—How do you reconcile your present argument with *Steele v. Hoe*? The **possibility* of its being bad, is not enough. There, it was quite consistent with the language used, that there might have been a previous resignation. *Lush* (who was counsel in the cause) stated that the resignation and the giving of the guarantee were in fact simultaneous acts.] You cannot lay a promise with one qualification, and prove a promise with another. This declaration is so ambiguous that it is impossible for the court to say what the consideration for the defendant's promise was.

Kettle, in reply.—The court will so construe this guarantee as to give effect to it, if possible. *Non constat* that there was any subsisting debt from Baker & Co. to the plaintiffs due at the time the guarantee was given, though there might have been previous transactions between them. The obvious grammatical construction of the instrument is, that the defendant's liability was to commence at the time the iron was received.

JERVIS, C. J.—I am of opinion that the plaintiffs in this case are entitled to the judgment of the court. If it were necessary, in deciding this case, to confine our attention to the guarantee itself, I think the authorities cited by Mr. *Keating* show that we might, in order to assist us to a right understanding of the words used, look to the extraneous circumstances. I see no difference between receiving parol evidence to explain the meaning of the words "for iron received," in this guarantee, and receiving it to explain the words "having released," in *Butcher v. Steuart*, and "having advanced," in *Goldshede v. Swan*. As I understand this case, it is not necessary to refer to any authorities in support of the position for which *Steele v. Hoe* was cited. It is admitted, that, if the three papers refer to each other, they must be read together. Now, that they do refer to each other, is clear. The last paper is,—
 *774] "I hereby engage **to* guaranty to Messrs. Colbourn the sum of 200*l.* for iron received from them for Messrs. Baker, as annexed;" the meaning of which is, "I, on behalf of Messrs. Baker, engage to guaranty you for iron supplied to them, as I have undertaken to do upon the fly-leaf hereof." The paper so referred to, is, "In reply to yours of the 24th instant, I beg to say that I have no objection to become security for Messrs. Baker." Then, for the purpose of seeing what has induced the defendant to give the guarantee, we must refer to

the letter of the 24th, which is,—“We are doing business with Messrs. Baker, and we require a guarantee to the amount of 200*l.*, and they refer us to you for one.” So that the result of the whole is this,—“As you are doing business with Messrs. Baker, and in consideration of your continuing to do business with them, I guaranty you to the amount of 200*l.* for goods received.” What is the meaning of “doing business?” It means doing and continuing to do business, that is, continuing to supply goods. If so, that is a good consideration,—In consideration of your doing and continuing to do business with Messrs. Baker, I guaranty the payment to the extent of 200*l.* Then, what is the promise? It is, “I guaranty the sum of 200*l.* for iron received,” that is, for goods already supplied, or for goods which may hereafter be supplied. It is a continuing guarantee involving a liability in respect of both past and future supplies. In declaring upon such an instrument the plaintiff is not bound to state the whole promise: it is enough to say that in consideration of so and so, the defendant promised to pay him 200*l.* for goods supplied or to be supplied: and he is not bound to prove both. I think there is a good promise alleged, and that the papers produced would support that promise. I therefore think the plaintiffs are entitled to judgment.

*CRESSWELL, J.—I am of the same opinion. It appears to me, [*775 that, if the consideration and the promise are looked at apart from each other, all difficulty vanishes. The letter applying for the guarantee states that the plaintiffs are carrying on business with Messrs. Baker, and that they require a guarantee for 200*l.* In answer to that, the defendant writes,—“In reply to yours of the 24th instant, I beg to say that I have no objection to become security for Messrs. Baker, and subjoin the following memorandum to that effect.” That is, in consideration of the letter I have received from you, and the circumstances mentioned in it, I have no objection to be guarantee for them to the amount of 200*l.*: not for any then existing debt of that amount,—not for any particular supply of goods,—but generally as a security in your business transactions, to the amount of 200*l.* What is the promise? “I hereby engage to guaranty to Messrs. Colbourn the sum of 200*l.* for iron received from them for Messrs. Baker, as annexed,”—which probably means, “as I have already mentioned in my letter on the other side.” Whether that includes goods already supplied, or not, seems to me to be quite immaterial: it undoubtedly does include future supplies. I therefore think that there is a sufficient consideration alleged, and a sufficient promise; and that the proof supports the declaration.

WILLIAMS, J.—I am of the same opinion. Looking at the three documents, I think it is to be collected from them with convenient certainty, and without doing more violence to the grammatical construction of the language than the authorities warrant, that this was a continuing guarantee to the extent of 200*l.*, and that the declaration is supported.

*776] TALFOURD, J.—I am of the same opinion. It must *not be taken for granted that the word “received” has reference to past or to future advances exclusively. Looking at the three documents together, I cannot doubt that it has both a past and a future aspect.

Judgment for the plaintiffs.

A guarantee in the following terms, “I will guaranty their engagements, should you think it necessary for any transactions they may have in your house,” was held an absolute and continuing guarantee, until countermanded. *Grant v. Ridsdale*, 2 Hall & Johns. 186. See also *Gremer v. Higginson*, 1 Mason, 323; *Rapelye v. Bailey*, 3 Conn. 438; *Clark v. Burdett*, 2 Hall, 197; *Hall v. Rand*, 8 Conn. 561; *Lawrence v. M’Callmont*, 2 Howard S. C. Rep. 426.

It seems that a guarantee will not be construed as a continuing one, unless its language

clearly indicates that such was the intention of the parties. *White v. Reed*, 15 Conn. 457. The defendant gave the plaintiff a writing in these words, “For any sum that my son may become indebted to you, not exceeding \$200, I will hold myself accountable:” held that the terms of this instrument were satisfied when any one indebtedness within the amount limited was incurred, and consequently that it was not a continuing guarantee. *Ibid.* See also *Boyce v. Swart*, 1 Rice, 126; *Whitney v. Groot*, 24 Wend. 82; *Fellows v. Prentiss*, 3 Denio, 512.

AMBROSE v. KERRISON. April 16.

The husband is liable for the necessary expense of the decent interment of a wife from whom he has been separated,—whether the party incurring such expense is an undertaker or a mere volunteer.

THIS was an action of debt, for money paid by the plaintiff to the use of the defendant. Plea, *nunquam indebitatus*.

The cause was tried before PARKE, B., at the last assizes for Essex. The circumstances out of which the claim arose, were as follows:—Mr. and Mrs. Kerrison were married in the year 1820, and lived together for some years, but ultimately parted. Mrs. Kerrison had, for her life, the interest of 4000*l.* stock, settled to her separate use. After the separation, she resided for some time alone at Kelvedon, in Essex; and afterwards she removed to Camberwell, where she died in January, 1850. Upon that event taking place, one Gale, a friend of the late Mrs. Kerrison, and who had been professionally concerned for her on the occasion of the separation, and in the trust matters, upon hearing of her death, went to the house where she had resided, and, finding that she had expressed a desire to be placed in the family-vault at Kelvedon, communicated with the plaintiff, who resided at that place, and who was distantly connected with the deceased. The plaintiff thereupon came to town, and gave orders for the removal and interment of the deceased at Kelvedon. No communication was made to the husband until about *777] ten days after the funeral. It *appeared that the plaintiff did not know where the husband resided; but Gale knew who were the deceased’s trustees.

The whole amount of the expense of the removal and burial of the deceased, was 23*l.* 18*s.* The defendant had paid 12*l.* 1*s.*, being the

amount of the expenses incurred up to the time of the coffin reaching the Eastern Counties Railway station; but he refused to pay for the additional expense of the removal to and the funeral at Kelvedon.

On the part of the defendant, it was contended that he was not liable for any part of the expense, the plaintiff being a mere volunteer.

For the plaintiff, reliance was placed upon the case of *Jenkins v. Tucker*, 1 H. Blac. 91. It was there held, that, where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expenses of her funeral (suitable to the rank and fortune of the husband), though without the knowledge of the husband, may recover from him the money so laid out,—especially if such third person be the father of the wife. And Lord LOUGHBOROUGH said: "I think there was a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant; for, the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands: the money, therefore, which the plaintiff pays on this account, was paid to the use of the defendant. A father, also, seems to be the proper person to interfere in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid."

*The learned judge thought, that, under the circumstances, the law imposed a liability on the husband to pay for a decent funeral [778 for his wife, equal to his position in life, and that her wishes as to the place of interment were reasonable wishes, and might properly be complied with: and he told the jury, that, if they thought the amount reasonable, they must find for the plaintiff.

The jury accordingly returned a verdict for the plaintiff, damages, 11*l.* 12*s.*

Montague Chambers now moved for a new trial, on the ground of misdirection.—The question is, whether a total stranger, volunteering to pay the expense of the funeral of a woman who had been living separate from her husband, upon an adequate separate income, can recover the amount from the husband upon a count for money paid to his use. The facts showed that there was no insuperable difficulty in communicating with the defendant before the funeral: for, Gale, it appeared, knew where the trustees lived, and there was ample time to make the necessary inquiries of them as to the defendant's residence. The case relied on at the trial stands upon a very different footing from this; and it is very singular, and remarkably questionable as to some of its doctrine. The husband was abroad, having left his wife in this country under circumstances which gave her power to pledge his credit for necessities.

[CRESSWELL, J.—The fact of the wife in this case having had a separate income cannot make any difference, for, that died with her.] It is a circumstance that is not to be lost sight of: and there the funeral was directed and paid for by the wife's father,—a fact upon which Lord LOUGHBOROUGH places some reliance. All the other cases are cases where the undertaker has been the plaintiff. He obviously stands in a very different position from that of a mere stranger. [CRESSWELL, J.—*779] Assuming the husband to be *liable at all in this case, you do not question the amount?] It would be idle to get a rule upon that ground.

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. It is admitted by the counsel for the defendant, that, if he was under any legal liability to pay this demand, no question can be raised as to the reasonableness of the amount: nor need we discuss the propriety of incurring the expense of removing the deceased to Kelvedon for interment. This being so, the point for our consideration simply is, whether a husband living apart from his wife is liable to a third person for expenses incurred by him for the decent and suitable interment of his wife. There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract. That liability in the executor is founded upon the duty which is imposed upon him by the character he fills, and a proper regard to decency, and to the comfort of others. And I think that the same reasons which call upon the executor to perform that duty, cast at least an equal responsibility upon the husband of a deceased wife, and, without any express authority or request on his part, compel him to recoup one who has performed the funeral. I see no difference in principle between the case of an undertaker and that of a third person who takes upon himself to employ and to pay the undertaker. In point of fact, the undertaker does not do all the work himself: he employs others to assist him. If, therefore, the circumstances of this case would cast a duty upon the husband to pay an undertaker,—which I think they do,—it seems to me, upon the reason of the thing, as well as upon the authority of *Jenkins v. Tucker*, that this plaintiff, though a volunteer, is equally entitled to maintain an action against the husband for money paid.

*780] *CRESSWELL, J.—I am of the same opinion. Whatever observations one or two of the expressions in Lord LOUGHBOROUGH's judgment in the case cited, may fairly be open to, I think the decision was right: and I fully adopt the language of HEATH, J., who says,—“The defendant was clearly liable to pay the expenses of his wife's funeral.” This is not exactly the case of a payment made by a mere volunteer: the plaintiff is the party who performed the funeral at his own expense.

WILLIAMS, J.—I am of the same opinion. I see no reason to dissent from the decision of this court in *Jenkins v. Tucker*. That case being good law, I think it must govern the present.

TALFOURD, J., concurred.

Rule refused.

HAMBER v. HALL. May 6.

The trade assignee of a petitioner under the insolvent debtors' acts, 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable personally for the messengers' fees and expenses in the absence of an express contract.

ASSUMPSIT for work and labour, money paid, money had and received, and money due upon an account stated. Plea, non assumpsit.

At the trial before JERVIS, C. J., at the adjourned sittings in London after Michaelmas term last, a verdict was taken for the plaintiff, for 259l. 10s., and interest, subject to the opinion of the court on the following case:—

The plaintiff was on the 26th of May, 1847, and has ever since been, a messenger of the court of bankruptcy in London, attached to the court of Mr. Commissioner GOULBURN. The defendant is a banker and solicitor at Ross, in Herefordshire, carrying on the business of a *solicitor in partnership with one Minett, under the firm of "Hall & Minett." [*781]

On the said 26th of May, 1847, John Matthewman presented his petition for protection from process to the court of bankruptcy in London, and that petition was duly allotted to Mr. Commissioner GOULBURN.

On the 27th of May, 1847, George Green was duly appointed official assignee of the estate and effects of the said John Matthewman under the said petition, and so remained until his death, on the 21st of October, 1849. On the 10th of November, 1849, William Pennell was duly appointed official assignee in the stead of the said George Green; and he so continued until the plaintiff was discharged from possession, as hereinafter mentioned.

On the 12th of June, 1847, the defendant, who was a creditor of the said John Matthewman, was duly chosen and appointed creditors' assignee of the estate and effects of the said John Matthewman under the said petition: he duly accepted such appointment, and has ever since been, and acted as, creditors' assignee.

On the 27th of May, 1847, the plaintiff, as such messenger as aforesaid, by virtue of a warrant under the hand and seal of the commissioner, directed to the plaintiff, as such messenger, duly seized and took possession of certain goods and effects in and upon a certain colliery belonging to the said John Matthewman, or wherein he was interested, situate at Oaken and Churchray Levels, St. Briavels', in the Forest of Dean, and by himself and his assistants had and retained possession of the said

goods and effects until he was discharged from such possession, on or about the 4th of March, 1850.

The said John Matthewman had no other property besides his goods and effects before mentioned, and his interest in the said colliery. The *782] said petition is now *filed of record, and remains of full force and effect, in the said court of bankruptcy. A final order in the matter of the said petition was made on the 1st of April, 1848.

The plaintiff's bill of fees, charges, and disbursements, as such messenger, under the said petition, have been taxed by the proper officer of the court of bankruptcy, and allowed at the sum of 259*l.* 6*s.* 9*d.* Of this sum, 251*l.* 7*s.* 3*d.* is due in respect of services subsequent to the date of the defendant's appointment as assignee; the residue is in respect of services before the date of such appointment.

No assets have ever been received by the official assignee, or by the defendant, out of the estate of the said John Matthewman. The defendant never was upon the colliery; nor did he ever interfere with the plaintiff, or with his possession of the said colliery, or the goods and chattels of the said John Matthewman thereon, except as far, if at all, as the same may be inferred from the correspondence and affidavit hereinafter set out.

The following correspondence passed between the plaintiff and the defendant and his agents:—

“ 6th February, 1849.

“ Re Matthewman.

“ As my assistant has been in possession from May, 1847, to the present time, and not knowing how long this expense may be continued, I am desirous of calling your attention to the circumstance, with a view of ascertaining whether this matter is likely to be much longer before it is settled.”

“ Ross, 8th February, 1849.

“ Re Matthewman.

“ Mr. Hall, to whom your letter of the 6th instant is addressed, is prevented replying to it by severe indisposition, and I therefore write. *783] Our London agents, *Messrs. Smith & Son, who have recently been in communication with Mr. Green, the official assignee, and with the Messrs. Braithwaites' solicitor, on the subject of this business; and something definitive will be done. It is useless waiting any longer for Mr. Matthewman; and I only regret that so much time has been lost, by listening to his propositions, none of which seem likely to be realized.

“ P. S. It is a pity the man has been kept in possession. I suggested that he might be withdrawn at the outset: but I presume it was necessary to keep him in.”

“ February 28th, 1849.

“ Re Matthewman.

“ In consequence of your communication, I called upon Mr. Green;

but, to my surprise, he states that no proposal for the mines has been submitted for his consideration. As there must be a mistake somewhere, I think it right to acquaint you with the fact, having called your attention already to the great length of time my man has been kept in possession. I must beg, if the matter is longer delayed, to be favoured with a remittance on account of my bill, which at the present time is about 185*l.*, a very large portion of which is money out of pocket."

"March 14th, 1849.

"Re Matthewman.

"I have written to the assignee, with a view of calling his attention to the expense, and length of time my assistant has been in possession, and to inquire if the matter was in a train for settlement: in reply to which I learnt that a proposal has been made, and the particulars were forwarded to the official assignee. I find, however, on inquiry at his office, that no communication has been made. My object in troubling you with these remarks, *is, to inquire if you can supply me with any information upon the subject. You are, doubtless, aware [*784 that the assignee (in the event of there being no funds) is liable for my costs: and I am only anxious that he should be made acquainted with his liability. The last letter I wrote to the assignee is unanswered: and, before I take any other course, I should feel obliged by an answer at your earliest convenience."

"March 15th, 1849.

"Re Matthewman.

"We are in daily expectation of receiving instructions as to calling a meeting of the creditors, or to learn what course is to be adopted as to this estate."

"March 16th, 1849.

"Re Matthewman.

"I requested our London agents, Messrs. Smith & Son, to see Mr. Green, and arrange for a creditors' meeting, to determine what should be done with the Oaken Level Colliery; but it seems that he wished some further information before calling a meeting. I think we have got all that can be obtained: and I have now requested them to see Mr. Green again, and get the meeting fixed. It is quite useless waiting any longer for Mr. Matthewman; and no further delay should, I think, take place in calling the meeting. If you wish any further information, perhaps you will call upon or write to Messrs. Smith & Son. Mr. Hall has no money in hand."

"April 16th, 1849.

"Re Matthewman.

"Will you have the goodness to say whether you are instructed to call a meeting of the creditors to dispose of this protracted matter? If not, I must urge Mr. Hall to *send me a remittance on account of my costs. The last letter I received from this gentleman stated [*785

he had nothing in hand. This reply, as you are aware, is no answer to my demand, as Mr. Hall is liable for my charges."

"6th September, 1849.

"Re Matthewman.

"The affidavit made by you in this matter sufficiently explains the cause of the delay in disposing of the estate. But you must be aware that I am still advancing money to pay my assistant for the possession. I hope, therefore, you will oblige me by sending a remittance of 50*l.* on account."

The affidavit above referred to was read on the part of the defendant on the taxation of the plaintiff's costs in the court of bankruptcy. It was as follows:—

"In the Court of Bankruptcy,

"In the matter of John Matthewman, an insolvent debtor.

"Henry Minett, of, &c., maketh oath and saith, that the property of the above-named insolvent consists of a colliery, or some share in a colliery, called the Oaken Level, situate in the Forest of Dean, in the county of Gloucester, and divers tram-plates, pit-carts, working tools, and other plant and utensils employed in working the said colliery, and of no other available property, as this deponent believes: That J. W. R. Hall, of, &c., was appointed the assignee to the estate and effects of the said insolvent: That this deponent (in the country) and Messrs. Smith & Son, the London agents of this deponent and his said copartner (in London), have respectively acted in the management of the professional business of the said assigneeship: That, some time after *786] *the said J. W. R. Hall was appointed assignee, this deponent, through the said Messrs. Smith & Son, suggested to Mr. Green, the official assignee, whether any arrangement could be made by which the expense of keeping the messenger in possession of the said colliery could be saved; but this deponent was informed that the said Mr. Green considered it imprudent to withdraw the messenger from possession, on account, as this deponent believes, of there being disputed questions of copartnership between the said insolvent and Messrs. John and Frederick Braithwaite, or some other persons; and this deponent and the said J. W. R. Hall did not therefore think it advisable to withdraw the messenger; and this deponent believes, that, under all the circumstances, the trade-assignee would not have been advised, on his own responsibility, to do so: That the affairs of the said John Matthewman were involved in great confusion at the time of his insolvency; there being encumbrances upon encumbrances existing over the said colliery, and divisions and subdivisions of interest therein, and agreements and transactions between the said insolvent and the said John and Frederick Braithwaite, very complicated and difficult to understand; and it was not until a considerable time after the said J. W. R. Hall was appointed assignee, that any definite information could be obtained as to the nature of

the dealings and transactions between the said insolvent and the said John and Frederick Braithwaite: That, at length, a large mass of papers, comprising several hundred sheets, were placed by the said Messrs. Braithwaites' solicitors in the hands of the said Messrs. Smith & Son, who perused them; and they were also examined by this deponent; and a great deal of time and attention were bestowed by the said Messrs. Smith & Son and this deponent on the said papers, for the purpose of ascertaining *the interest of the said John Matthewman in the said colliery, [*787 and the nature of the interest of the said John and Frederick Braithwaite, if any, therein: That the said Messrs. Smith & Son and this deponent had a long correspondence, and many interviews, with the solicitors of the said Messrs. Braithwaite, for the purpose of ascertaining the nature of their interest and claims in and upon the estate of the said insolvent; and the said Messrs. Smith & Son prepared and laid a case before counsel, for his opinion thereon: That the nature and extent of the claims of the said Messrs. Braithwaite upon the said estate, and also of the mortgage and other encumbrances thereon, are still, notwithstanding all the pains taken to ascertain them, by no means clear and well defined: That divers propositions have been made by the said John Matthewman, for the purpose of arranging with his creditors, and letting the said colliery on lease, or otherwise disposing of the same, all of which he has failed to carry into effect, although every facility has been given to him by the official and trade assignees for enabling him to do so: That the said colliery has, since the insolvency of the said John Matthewman to the present time, been kept open and worked by one G. Franklin, who had the management of the same at the time the said John Matthewman became insolvent; but the coals obtained therefrom have not been sufficient to pay the working expenses, as there is, as this deponent has been informed, and believes, a balance owing to the said G. Franklin, in respect of the working of the said colliery: That it was necessary and proper to keep the said colliery open, or the same would have fallen to ruin and decay, and great loss would have ensued to the estate: That the said J. W. R. Hall has not received any funds whatever from the said estate; but, on the contrary, is *considerably [*788 out of the pocket by the necessary management of the business: That the said J. W. R. Hall is, as this deponent well knows, most anxious to realize the estate without loss of time: and the same will be realized as expeditiously as possible: That, with a view thereto, this deponent and the said Messrs. Smith & Son called together, in London, on the 10th of August instant, the mortgagees and other persons claiming interests in the said colliery; and this deponent attended such meeting; and it was proposed by this deponent and the said Messrs. Smith & Son, that, with the view of preventing a chancery suit, and the consequent impoverishment of the estate, all parties whose concurrence was necessary should concur in a sale of the said colliery, that the

purchase-money should be placed in the hands of the official assignee, and that the commissioner in this matter should then decide between the several parties as to their rights and interests: That the persons present at such meeting considered it desirable that such an arrangement should be made, and, as a preliminary step, that a valuation of the colliery should be made by a competent person: That, in pursuance of such opinion, this deponent has been engaged in making inquiries as to a competent person to make the said valuation; and this deponent is about to employ a person to make the said valuation, and pledges himself that no delay shall take place in bringing the business to a conclusion: That the said J. W. R. Hall will necessarily have to incur large expenses out of pocket, before the said colliery can be turned into money, in obtaining a valuation, advertising, auctioneers' fees, and travelling and other expenses; and this deponent humbly submits that it would be a great hardship upon him, to be called upon to pay the messenger's bill, unless he had funds in hand to liquidate the same, in-
 *789] asmuch as the outlay has *necessarily arisen from the complicated and difficult nature of the said insolvent's affairs: That the official assignee has been from time to time communicated with and consulted on the various steps taken in the matter; and this deponent believes, that, what has been done, has been done with his full approbation and concurrence: That the said J. W. R. Hall has been for some time past labouring under indisposition; and he is now, and has been for the last fortnight, necessarily absent from England, his medical attendant having advised him to try the German baths and waters, with a view to his restoration to health."

"Ross, 15 September, 1849.

"Re Matthewman.

"We have written to our agents respecting your application to Mr. Hall for payment of 50*l.* on account, and requested them to confer with Mr. Green respecting it. We hear that Mr. Green is not in town, but that he will be there on Wednesday, when they will see him. If there be any way of assisting you, be assured your application shall be attended to. We have now a valuation of the work more favourable than we expected; and Mr. Matthewman has made another proposition, which looks feasible, and we have now full hope of bringing the business to a speedy conclusion."

"19th October, 1849.

"Re Matthewman.

"I applied to you on the 6th of last month for a remittance of 50*l.* Not having received any reply, I have again to urge you to comply with the reasonable request. My bill is taxed, to the 25th of July last, and allowed at the sum of 203*l.* 0*s.* 9*d.* As I have been hitherto unfortunate in prevailing upon you to advance anything upon the large outlay I have made in keeping possession of this property, I must give you

notice of my *intention to take legal measures to enforce my [*790 claim, unless I have a remittance forthwith."

"23d October, 1849.

"Re Matthewman.

"Mr. Hamber has consulted me respecting his claim on the assignee of this estate, and instructs me to inform you that he has no desire to inconvenience the assignee by insisting on his right to payment from him, without reference to the possible realization of assets under the estate. At the same time, the delay has been very great; and his (Mr. Hamber's) bill is increasing at the rate of near 8l. per month. And, as it seems unreasonable that such an estate should be preserved at the sole cost of the messenger, who has no personal interest in the matter, he instructs me to request you will procure and send him a check for 100l. on account in the course of this week; and, if that is done, he will allow the remainder to stand over for the present."

"October 29, 1849.

"Re Matthewman.

"The assignee has not a penny in hand. A meeting will be held, room No. 6 Law Institution, at 2 o'clock on Friday next. Would it not be better for Mr. Hamber to attend? He will there learn all that is known; and it will be seen if any assets can be set apart, so as to make him a payment."

On or about the 27th of February, 1850, Messrs. Smith & Son received from Mr. Pennell, the official assignee, a paper signed by the said Mr. Pennell, of which the following is a copy:—

"Guildhall Chambers, 26 Feb. 1850.

"The messenger will quit possession of the bankrupt's premises, on receiving this notice, countersigned by the creditor's assignee.

"WILLIAM PENNELL,

"Official Assignee."

*That paper was enclosed in a letter, of which the following is [*791 a copy:—

"27th February, 1850.

"Re Matthewman.

"I have seen Mr. Hamber, who has no objection to wait ten days longer for payment of his bill. I enclose the notice to the messenger, as arranged."

Upon receipt of the said notice, the defendant signed the same. A copy of this paper was shown to the plaintiff at the time of the delivery of the letter next hereinafter mentioned.

"March 4th, 1850.

"Re Matthewman.

"Please to give the bearer an order for your man to withdraw from possession. It is needful that you should not send it direct to him, as

the assignee has arrangements to make with Mr. Franklin, before the messenger quits possession."

"21st April, 1850

"Re Matthewman.

"I undertook, at the particular request of the official assignee in this matter, to stay further proceedings for a month, with a distinct understanding, that, at the expiration of that time, I should be paid. The time is now expired. As I have not heard from you on the subject, I must give notice of my intention to proceed, unless I am paid forthwith. The first bill is taxed at the amount of 20*3*l. 0*s*. 9*d*., and the further time at 56*l*. 6*s*."

The pleadings, particulars, and bill of costs as taxed, are to be taken as part of the case. The court is to be at liberty to draw any inference of fact which a jury might have done.

*792] *The question for the opinion of the court, is, whether the plaintiff is entitled to recover the whole or any, and, if any, what part of his bill; and whether with or without interest. If the court should hold him so entitled, the verdict is to be entered for such amount as the court shall direct. If not, the verdict for the plaintiff is to be set aside, and a nonsuit entered.

Lush (with whom was *Montagu Chambers*), for the plaintiff.—It will be contended, on the part of the plaintiff,—first, that the trade assignee of an insolvent, under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, is under the same liability as to the messenger's bill, as the assignee of a bankrupt,—secondly, that, if not so liable, the correspondence and affidavit set out in this case, afford evidence from which a contract to pay may and ought to be inferred.

1. The question as to the liability of the assignee of a bankrupt, under the 5 G. 2, c. 30, s. 25, arose in *Burwood v. Felton*, 3 B. & G. 45 (E. C. L. R. vol. 10), 4 D. & R. 621 (E. C. L. R. vol. 16). Then came the case of *Hamber v. Purser*, 2 C. & M. 209, † 4 Tyrwh. 41, where it was held, that an action lay at the suit of the messenger against the sole assignee under a commission issued under the 6 G. 4, c. 16, for the costs of advertising a meeting of creditors, and for the hire of the room in which the meeting was held; and that it was not necessary for the plaintiff to prove an employment by the assignee, nor any express recognition of him as messenger, as the fact of his having acted as messenger, and of the expenses being incurred, must have been known to the assignee. [JERVIS, C. J.—The main point was not before the court there: the decision proceeded on the ground of privity of contract. The next

*793] *case was *Robson v. Jonasshon*, 7 M. & G. 351 (E. C. L. R. vol. 49), 8 Scott, N. R. 35, where it was held that the messenger to a *fiat* in bankruptcy appointed by the commissioners under the 6 G. 4, c. 16, s. 27, may be removed by the assignees. And in *Ex parte Hartop*, 9 Ves. 109, a commission of bankruptcy having been superseded for fraud, nothing

having been done under it, and the petitioning-creditor not being to be found,—the assignees who had not attended the summonses, though not privy to the fraud, and not having received any effects, were ordered to reimburse the messenger the expense subsequent to the choice of assignees, but not that previously incurred. [JERVIS, C. J.—All these are cases of contract.] The facts here amply show an implied contract on the part of Hall. He knew that the messenger's assistant was in possession. The trade assignee is appointed for the express purpose of looking after the estate of the insolvent. [JERVIS, C. J.—Has the trade assignee power to dismiss the messenger?] The official assignee is appointed under the 1 & 2 W. 4, c. 56, s. 22; and the 23d section enacts that nothing therein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors, in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects. [JERVIS, C. J.—That is probably because the attorney suing out the *fiat* is generally friendly to the bankrupt. CRESSWELL, J.—By s. 22, the property of the bankrupt is to be possessed and received by the *official assignee alone*, save where otherwise directed by the court of bankruptcy.] By s. 25, the property is absolutely vested in the *assignees*. [CRESSWELL, J.—The *property* is in the two, but it is to be *possessed* by the official assignee alone.] By the 5 & 6 Vict. c. 116, s. 1, [*794 it was enacted, that, “upon the presentation of any such petition, all the estate and effects of the petitioner shall forthwith become vested in the *official assignee* who shall be nominated by the commissioners acting in the matter of the said petition; and such *official assignee* shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said *official assignee* shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts.” The 7 & 8 Vict. c. 96, makes some alteration in this respect: the 4th section enacts that the property of the petitioner shall vest in the assignee *or assignees* for the time being, by virtue of their appointment; provided that “the property of the petitioner shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the commissioner.” The 10th section is important: it enacts, that, until an assignee shall be chosen by the creditors, the official assignee shall be enabled to act, and shall be deemed to be, to all intents and purposes, a sole assignee of the property of the petitioner, and, if the commissioner shall so order, may sell or otherwise dispose of such property, &c.; and the property vested in any official assignee alone, or jointly with any assignee chosen by creditors under the 5 & 6 Vict. c. 116, or this act, shall not remain in such official assignee alone, or jointly with such assignee chosen by creditors, if such official assignee shall resign or be removed from his office,

nor in the heirs, &c., of such official assignee, nor in the surviving assignee alone, in case of the death of such official assignee, but all such property shall in every such case go to and be vested in the successor in office of such official assignee alone, or jointly with the assignee chosen *795] by the creditors (if any), *as the case may be. [JERVIS, C. J.—Is not this act incorporated with the bankrupt act?] To some extent it is.(a) By the 13th section of the 5 & 6 Vict. c. 116, the judges and commissioners of the court of bankruptcy, or any four of them, are empowered to make orders, rules, and regulations for the better carrying the act into execution, and particularly for regulating and appointing the duties of the official and other assignees; and this was done by general orders of the 1st of November, 1842. Referring to the practice in bankruptcy, it is clear that the creditors' assignee is the person who realizes the estate. [JERVIS, C. J.—He is *possessed* of the estate.(b)]

2. At all events, there is enough upon the face of the correspondence set out in the case, to show an implied contract on the part of the defendant to pay expenses necessarily incurred with his knowledge and sanction. The order for the discharge of the messenger from possession comes from the defendant. [CRESSWELL, J.—It emanated from the official assignee.] The assignee voluntarily accepts the office, knowing it to be fettered with responsibilities: and there is no reason why he should be allowed to evade them.

Channell, Serjt. (with whom was *Bovill*), contra.(c)—The defendant is under no liability for the demand in question simply as creditors' assignee: and there is no evidence of an implied contract to pay the messenger's expenses out of his own funds. All the cases upon the subject occurred prior to the time when official assignees *were first *796] introduced. By the statutes, the right of possession of the insolvent's property is exclusively vested in the official assignee. There is nothing to show that the messenger in this case kept possession of the colliery at the request of the defendant, or even with his concurrence; but there is much to show the reverse. The question turns mainly upon the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. [JERVIS, C. J.—The 1 & 2 W. 4, c. 56, also has an important bearing upon it.] The 1st section of the 5 & 6 Vict. c. 116, came under the consideration of the Court of Queen's Bench in a case of *Sayer v. Dufaur*, 11 Q. B. 325 (E. C. L. R. vol. 63), where it was held, that the official assignee of an insolvent, appointed under that section, might immediately on his appointment sue in his own name for an outstanding debt due to the insol-

(a) See section 73.

(b) See 12 & 13 Vict. c. 106, s. 141.

(c) The point marked for argument on the part of the defendant, was,—“that, as creditors' assignee, having regard to the date of his appointment, and to the other facts stated in the case, he is not liable, except upon an express contract with, retainer of, or promise to, the plaintiff, to pay him his demand, or any portion thereof; and that there are no facts stated in the case from which such a contract, retainer, or promise, can or ought to be implied.”

vent. By s. 4, the final order is to be "for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by the commissioner, together with an assignee to be chosen by the creditors." The 7th section enacts, that, from and after the passing of the final order, the whole estate, &c., of the petitioner shall become absolutely vested in the official assignee and the assignee chosen by the creditors. The subsequent statute does not materially vary the matter, except that the 4th section contains a proviso "that the property of the petitioner shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the commissioner." [JERVIS, C. J.—Who would be liable to the messenger, before the choice of a trade assignee? Under the old bankrupt acts, the petitioning creditor was liable.(a)] There is no provision for that in these statutes.

**Lush*, in reply.—The defendant, throughout the whole correspondence set out in the case, is assumed to be, and treated as, the person having sole and entire control over the messenger, and as the person who is to exercise his discretion as to the keeping or relinquishing possession. [*797]

JERVIS, C. J.—I am of opinion that the defendant in this case is entitled to the judgment of the court. Although it is asserted generally in the text-books, that the assignees are responsible to the messenger for his fees, no section of any statute is cited as an authority for that position: and I think all the cases that are to be found upon the subject resolve themselves into cases of contract. Under the old statutes, it was the duty of the trade assignees to receive and to administer all the property of the bankrupt; and, when they found a messenger in possession, and knew that he was doing acts which they themselves were bound to do, their permitting him to continue in possession was such a recognition of an act done for their benefit, and such an adoption thereof, as to amount to an implied contract to pay his expenses. That, I apprehend, was, because they were bound to do the act, and adopted it as an act done for their benefit. Here, however, there is no evidence of any express or positive contract. The messenger was appointed by the official assignee: but, it is said, the defendant allowed him to continue in possession. But the question is, whether we are to imply a contract, from the relative position of the assignee, and what is the degree of his liability. The question is the same under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, as under the bankrupt act 1 & 2 W. 4, c. 56; for, the 5 & 6 Vict. c. 116, ss. 1 and 7, in substance re-enact the 22d and 25th sections of the 1 & 2 W. 4, c. 56, and the 7 & 8 Vict. c. 96, ss. 4 and 10, re-enact the 1st and 7th sections of the 5 & 6 Vict. c. 116, though in an inverted order. *What, then, is the combined effect of these provisions? I apprehend it is this,—that, whereas formerly an assignment [*798]

(a) See 6 G. 4, c. 16, s. 14: and see 12 & 13 Vict. c. 106, s. 114.

from the commissioners was necessary to vest the bankrupt's estate in his assignees, now the property is *vested* by the act of adjudication in the official and trade-assignee, but it is to be *possessed* by the official assignee alone. It is the duty of the official assignee, therefore, and not that of the trade assignee, to keep possession of the property. The trade assignee does not receive anything: all is received by the official assignee. The former, therefore, if liable for the charges in question merely because he is the assignee, would have no fund out of which to reimburse himself. It seems to me, therefore, that there was no contract, either express or to be implied, here, because the messenger was not doing an act which it was the duty of the trade assignee to do.

CRESSWELL, J.—I am of the same opinion. This is an action for work and labour done and money paid by the plaintiff at the request of the defendant. Now, there was undoubtedly no express contract, nor any express promise to pay. If the work and labour were done, or the money paid, for the defendant, and he afterwards sanctioned it, it might be implied that it had been done or paid at his request. If the expense had been incurred in doing something which the defendant was bound to do, and he knew that it was done, and did not dissent, it might very possibly be said to have been done for him. Now, the work done here, was, keeping possession of property of an insolvent. The law casts that duty upon the *official assignee*. What is there, then, to raise an inference that this was done at the request of the trade assignee? It being an act which by law is to be done by some one else, it seems to me that it *799] cannot with propriety be said to have been done either by the *defendant or at his request. I therefore think the plaintiff is entitled to the *postea*.

WILLIAMS, J.—I am of the same opinion. There is no evidence of any express contract, or of any express employment of the messenger by the defendant. Bearing in mind the character and duties of the trade assignee, I cannot find that the messenger was employed upon the retainer of the defendant: and I for one am not disposed to be astute to impose upon him an implied liability, where the legislature has not thought fit to impose an express liability.

TALFOURD, J.—I am entirely of the same opinion. It is found upon the case that the plaintiff was appointed messenger and took possession before the defendant became assignee. The defendant never was at the colliery, and never interfered, except as is to be gleaned from the correspondence. And from that I infer that the man was kept in possession much against the defendant's will. I think the plaintiff should be nonsuited.

Judgment of nonsuit.

*SMITH v. HARTLEY. May 2.

[*800

The declaration stated that a certain difference had arisen and was depending between A. and B. touching certain railway shares which A. at the request of B. had purchased for B., and for which A. had paid 122*l*.; that, for putting an end to the said difference, A. and B. submitted themselves to the award of C. to be made between them of and concerning the said difference; that B. promised to perform the award; that C. made his award of and concerning the said difference, and did thereby award that he decided in favour of A., and that 50*l*. which had been deposited by A. with B., was in part payment of the said twenty shares, and A. by his award did then request B. to pay the balance of the account forthwith; and that B. refused to pay A. the balance of the said account, amounting to 72*l*., according to the tenor and effect of the award:—

Held, that the arbitrator's authority to make the award sufficiently appeared, although the nature of the difference was not specifically stated; and that the "request" to pay amounted to a direction.

But, *semble*, that the direction to pay "the balance of the account," would have been objectionable, if pointed out as cause of special demurrer.

ASSUMPSIT. The first count of the declaration stated, that, before the making of the promise thereafter next mentioned, a certain difference had arisen and was then depending between the plaintiff and the defendant touching and concerning twenty shares in The Southampton, Manchester, and Oxford Junction Railway, which the plaintiff, at the request of the defendant, had before then purchased for the defendant, and for which the plaintiff had paid a large sum of money, to wit, 122*l*.; that thereupon, for the putting an end to the said difference, the plaintiff and defendant, theretofore, to wit, on the 8th of February, 1849, respectively, submitted themselves to the award of W. West and R. Peake, to be made between them of and concerning the said difference; that in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil the award of the said W. West and R. Peake, so to be made between the plaintiff and the defendant of and concerning the said difference, in all things on the plaintiff's part to be performed and fulfilled, he, the defendant, then promised the plaintiff to perform and fulfil the said award in all things therein contained on the defendant's part to *be performed and

[*801

fulfilled; that the said W. West and R. Peake, having taken upon themselves the burthen of the said arbitrament, afterwards, to wit, on the day and year aforesaid, made their certain award of and concerning the said difference, and did thereby then award that they, the said W. West and R. Peake, decided in favour of the plaintiff, and that 50*l*. which had been deposited by the defendant with the plaintiff, was in part payment of the said twenty shares; that the said arbitrators, by their said award, did then request the defendant to pay the balance of the account forthwith,—of which said award the defendant afterwards, on the day and year aforesaid, had notice; and that, although he the defendant was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff to pay him the balance of the said account, amounting to a certain

sum, to wit, 72*l.*, according to the tenor and effect of the said award, and of his said promise; yet that the defendant, not regarding his said promise, did not nor would on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards, pay the said sum of 72*l.*, or any part thereof, to the plaintiff, &c.

Special demurrer, assigning for causes,—that the award in the first count mentioned and set forth, is void in law, so far as it relates to the balance of the account therein mentioned, in this, to wit, that the account mentioned in the award, the balance whereof the arbitrators by the said award requested the defendant to pay, was a matter which, as far as appears from the first count, *was not referred to the said arbitrators* by the plaintiff and defendant; and that, even if the said account was a matter referred to the said arbitrators, and if the said arbitrators had any authority to award that the defendant should pay the balance thereof, the said award is uncertain and insufficient, in this, to wit, that the said arbitrators thereby merely *requested* the defendant to pay the *802] balance of the *said account*, and did not *order* or *direct* him to do so;—that it does not appear from the said award to whom the defendant was to pay the said balance;—that the said first count is uncertain and ambiguous, in this, to wit, that it does not appear therefrom, nor is it stated thereby, that, before or at the time of the making of the submission and award in the said first count mentioned, there was any account outstanding between the plaintiff and the defendant, or any debt due or claimed to be due from the defendant to the plaintiff; and that, for anything that appears to the contrary on the face of the said first count, the account therein mentioned may have been an account outstanding between the defendant and some person other than the plaintiff, and the said arbitrators, by their said award, may have requested the defendant to pay the balance of the said account to such person between whom and the defendant the same was so outstanding;—that if, in the said first count, the plaintiff intends to set forth the said award in its terms, the said first count is insufficient, uncertain, and ambiguous, for not explaining, by inducement, or otherwise, what account was referred to by the said award, and if in the said first count the plaintiff intends to set forth the said award according to its legal effect, and if the plaintiff intends that the legal effect of the award is such as to enable him to maintain an action, and declare thereon as in the said first count he has done, the said first count is uncertain, insufficient, and ambiguous, for not stating, that, by the said award, the said arbitrators ordered or directed the defendant to pay the balance of the said account to the plaintiff.

The plaintiff joined in demurrer.

Brandt (with whom was *Hoggins*), in support of the demurrer.—The first count is too uncertain as to the nature of the difference between the parties; it does not show that it had reference to any account, or

to any *particular sum. [CRESSWELL, J.—The single matter in difference seems to have been, whether the defendant should take the shares or not.] The plaintiff professes to set out the legal effect of the award: he was bound to set it out correctly. The arbitrators here commence by deciding nothing, and then they go on to *request* or recommend the defendant to “pay the balance of the account,” not saying to whom, or what is the amount of the balance, and no account having been before referred to. In Comyns’s Digest, *Arbitrament* (A.), it is said, “An arbitrament is the *judgment* or *decree* of persons elected by the parties to arbitrate of the things submitted to them: and five things must concur to it,—1. Matter in controversy,—2. A submission,—3. Parties to the submission,—4. Arbitrators,—5. Giving up the award.” *Lock v. Vulliamy*, 5 B. & Ad. 600 (E. C. L. R. vol. 27), 2 N. & M. 836 (E. C. L. R. vol. 28), is very much in point. There, an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration under the circumstances; but, in consideration of the clerk’s services out of the office on some occasions, and to meet the case in a liberal manner, he *proposed* that the architect should pay the clerk 10*l.*; and it was held that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and therefore not a good award.

Humfrey, *contra*.—It is enough for the plaintiff to show a state of facts which makes a substantive cause of action. It appears that the plaintiff had bought for the defendant certain railway shares, for which the plaintiff *had paid 122*l.*; that the defendant paid 50*l.* on account, and then refused to take the shares; that the difference between the parties was referred; and that the arbitrators requested the defendant to pay the balance. The sum awarded is sufficiently certain: *id certum est quod certum reddi potest*: deduct 50*l.* from 122*l.*, and the balance is 72*l.*, the sum awarded. The liability of the defendant to pay that sum, was the only matter in difference between the parties. There is no special demurrer on the ground that the award does not seem to have settled and ascertained the sum due to be 72*l.*

Brandt, in reply.—The plaintiff professes to set out the award according to its legal effect, but has not done so. An attachment clearly would not be granted for non-performance of such an award as this.

JERVIS, C. J.—I have entertained some doubt as to the construction of the first count: but I am happy that I have brought my mind to reconcile the form of the count with what is manifestly the justice of the case. There are, in substance, three objections urged here. First, it is said that it does not appear that the arbitrators had authority to award any specific sum,—secondly, that the amount is not ascertained

with sufficient certainty,—thirdly, that there is no direction or award to pay the balance, but merely a *request*.

1. By the rules of pleading, it is not necessary to set out in the declaration the terms of the reference. It is enough to state that there were matters in difference between the parties, and that the reference was of and concerning those matters. It will be presumed that the arbitrators acted within the scope of their authority; and it lies on the defendant to plead it, if they have exceeded their authority.

*805] *8. The introductory averment is, that a certain difference had arisen and was depending between the plaintiff and defendant touching certain railway shares which the plaintiff, at the request of the defendant, had purchased for the defendant, and for which the plaintiff had paid 122*l*. *Prima facie* that must be taken to be a payment, on account of the defendant, of the plaintiff's money. The count then goes on to state that the arbitrators made their award of and concerning the said difference, and did thereby award in favour of the plaintiff, and decided that 50*l*. which had been deposited by the defendant with the plaintiff was in part payment of the twenty shares, and that the arbitrators, by their said award, did then *request* the defendant to pay the balance of the account forthwith. I think this is equivalent to a statement that the arbitrators awarded or ordered the defendant to pay the balance, and that the defendant, who has undertaken to perform the award, is liable to the consequences of his disobedience.

2. As to the amount,—the want of precision in this respect is not pointed out by special demurrer. That is certain which by reference to the subject-matter may be rendered certain. In the absence, therefore, of a special demurrer, this objection also must fail.

The rest of the court concurring,

Judgment for the plaintiff.

*806] *GEORGE, Earl of CLARENDON, and Others, Appellants,
The Rector, Vestrymen, Churchwardens, and Overseers of the
Poor of the Parish of ST. JAMES, within the Liberty of WEST-
MINSTER, Respondents. *May 2.*

A society called "The London Library" was established for the purpose of lending books to its members, being supported in part by annual subscriptions, and in part by the voluntary contributions of its members, and precluded by its laws from making any dividend, gift, division, or bonus in money to or between any of its members:—Held, that such society, being duly certified under the 2d section of the 6 & 7 Vict. c. 36, was exempted from rates, &c., under s. 1. But, where portions of the premises leased by such society were underlet to other scientific bodies:—Held, that this was not such an *exclusive* occupation of the premises for the purpose of the society as to entitle it to the exemption.

Where upon appeal to the quarter sessions under this statute, a case is stated for the opinion of one of the superior courts, under the 12 & 13 Vict. c. 45, s. 11, costs are taxed as between party and party.

On the 19th of September, 1850, notice of appeal to the next Court

of Quarter Sessions of the peace, for Middlesex, was given to the rector, vestrymen, churchwardens, and overseers of the poor of the parish of St. James, within the liberty of Westminster, by George, Earl of Clarendon, William, Earl of Devon, and Philip Pusey, Esq., the occupiers, as trustees of the funds and property of a certain society called The London Library, of the premises No. 12, St. James's Square, in the said parish of St. James, in the city of Westminster, in the county aforesaid, against a certain rate or assessment made on the 4th of May, 1849, in pursuance of the several statutes in that case made and provided, by the said rector, vestrymen, churchwardens, and overseers of the poor of the parish of St. James, whereby the said society was rated, by the name of "The London Library," in respect of the said premises, in the sum of 31*l.* 10*s.*, for the year ending the 5th of January, 1850: and thereupon afterwards, by consent *of the said parties, and by order of MAULE, J., pursuant to the statute in such case made [*807 and provided, the facts of the case were stated for the opinion of this court, in the form of a special case; and it was agreed that a judgment might be entered, on motion by either party, in conformity with the decision of such court, and for such costs as such court should adjudge, at the sessions next or next but one after such decision should have been given: and the said parties further agreed to the statement of facts as set forth in the following case:—

This is a case of notice of appeal by the trustees of the society next hereinafter mentioned, against a rate made on the 4th of May, 1849, by the rector, vestrymen, churchwardens, and overseers of the poor of the parish of St. James, within the liberty of Westminster, in pursuance of the several statutes authorizing the same, whereby the said society was rated in respect of the premises hereinafter mentioned, occupied by it, in the sum of 31*l.* 10*s.* It is not intended to raise any question in respect of the form of the rate, or of the time at which the notice of appeal was given. It is admitted that the rate in question is a local rate within the meaning of the act of parliament hereinafter mentioned, to which the appellants, in respect of their occupation hereinafter mentioned, were, at the time of the making the rate aforesaid, liable to be assessed, unless they were entitled to exemption from such liability, under the provisions of the act of parliament hereinafter mentioned; and that the facts hereinafter stated respecting the said society are true of the whole period for which the said rate was made, that is to say, of the year ending the 5th of January, 1850; and that they are also true of the whole period, beginning with the 17th of April, 1846, down to the day of the date of the notice of appeal aforesaid.

"The London Library" is the name of a society *instituted in 1841, for the purpose of establishing a large and comprehensive [*808 lending-library in the metropolis, to which the members might resort for books of a superior class to those supplied by the ordinary circulating

libraries. The books are lent to members only: and a collection of upwards of 50,000 volumes has been made by the society, and that collection constantly receives, at the expense of the society, additions, including almost every new work of interest or importance, both in English and foreign literature.

The books of the society are deposited, and its business is transacted, in the house No. 12 St. James's Square, in the parish of St. James, within the liberty of Westminster, in the county of Middlesex, where apartments are open for the use of the members of the society from the hour of eleven in the morning to the hour of six in the evening, daily, Sundays excepted.

This house has been leased to the Earl of Clarendon, the Earl of Devon, and Philip Pusey, Esq., the trustees of the funds and property of the society, for a term of twenty-one years, at an annual rent; and they, as such trustees, by the society, are the occupiers of the said house.

The society is supported, in part, by annual voluntary contributions from its members, and does not, and by its laws may not, make any dividend, gift, division, or bonus in money, unto or between any of its members. The society has caused a catalogue of the books in its possession to be printed at the expense of the society; copies of which catalogue are sold to the members, and to any other persons applying for them, at the said house, at a sum below the cost price of printing; and no profit has ever been derived from the sale of the catalogue by the society; on the contrary, the society has sustained a considerable loss by such printing and sale.

*809] A portion of the said house is used for the meetings held by a certain society called The Philological Society. Another portion of the said house is sub-let, for the transaction of its business, to a certain society called The Statistical Society. Certain portions of the said house were also used, from the 1st of January to the 24th of June, 1849, for the transaction of its business, by a certain society called "The Hakluyt Society."

The Philological Society pays to the society called "The London Library," for its use of the said portion of the said house, the sum of 85*l.*, as an annual rent. The Statistical Society pays to the society called "The London Library," for its exclusive use of the said portion of the said house, the sum of 150*l.* as an annual rent. And the said Hakluyt Society paid to the society called "The London Library," for the said use by the said Hakluyt Society of portions of the said house during the time aforesaid, the sum of 5*l.* The said several annual rents, making together the sum of 185*l.*, are wholly expended in defraying the expenses of the said society called "The London Library."

The Philological Society, The Statistical Society, and The Hakluyt Society, are severally societies established for purposes of literature and

science exclusively, and are not, nor is either of them, under the authority or control of, or, save as aforesaid, connected with, the society called "The London Library."

In the year 1846, the society called "The London Library" submitted, in the manner prescribed by an act passed in a session of parliament holden in the 6th and 7th years of the reign of Her present Majesty, intituled "An Act to exempt from county, borough, parochial, and other local rates, land and buildings occupied by scientific or literary societies," (a) to the *barrister-at-law for the time being [810 appointed to certify the rules of friendly societies in England, three copies of a printed book, containing, along with other matters, the laws, rules, and regulations for the management of the said society called "The London Library," for the purpose of ascertaining whether the last-mentioned society was entitled to the benefit of the last-mentioned act; and the said barrister afterwards gave a certificate on each of the said copies, that the last-mentioned society was entitled to the benefit of the last-mentioned act, and transmitted one of such copies, so certified by him, to the clerk of the peace of the county of Middlesex, who laid the same before the justices of the said county, at the general quarter sessions held next after the time when such copy had been so certified and transmitted as aforesaid; and the same was then and there, on the 17th of April, 1846, allowed and confirmed by the said justices, and filed by the said clerk of the peace with the rolls of the sessions of the peace in his custody.

[A copy of the last-mentioned printed book was annexed to the case. The rules were to be taken as part of the case.]

The Philological Society and The Statistical Society have, since the commencement of the year 1851, obtained from the said barrister certificates that they are entitled to the benefit of the last-mentioned act.

The question for the opinion of the court, is, whether, under the circumstances above set forth, the said Earl of Clarendon, Earl of Devon, and Philip Pusey, Esq., as such occupiers of the said house as aforesaid, were or were not, at the time of the making of the said rate, by virtue of the last-mentioned act, entitled to exemption from liability to be assessed or rated to any local rate within the meaning of the last-mentioned act, in respect of such occupation of the said house as aforesaid.

If this court shall be of opinion that the said Earl of *Clarendon, Earl of Devon, and Philip Pusey, Esq., as such occupiers [811 of the said house as aforesaid, were so entitled, the decision of this court is to be in favour of the appellants, and judgment of allowance of the said appeal on the ground of such exemption, and for such costs as this court shall adjudge, shall be entered at the sessions accordingly. But,

if the court shall be of the contrary opinion, its decision is to be in favour of the respondents, and judgment for dismissing the appeal, and for such costs as this court shall adjudge, and for amending the said rate by substituting the names of the said appellants for the words "The London Society" therein, is to be entered at the sessions accordingly.

Channell, Serjt. (with whom was *D. Keane*), in support of the rate.—It is conceded that the rate is well made, unless it be open to an objection founded upon the statute of 6 & 7 Vict. c. 36, the first section of which, reciting that "it is expedient that societies established exclusively for purposes of science, literature, or the fine arts, should be exempt from the charge of county, borough, parochial, and other local rates in respect of land and buildings occupied by them for the transaction of their business, and for carrying into effect their purposes," enacts, that, "from and after the 1st of October, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or assessments, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts, exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes; provided that such society shall be supported wholly or in part by annual voluntary *812] contributions, and shall not, and by *its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members; and provided also that such society shall obtain the certificate of the barrister-at-law, or Lord Advocate, as hereinafter mentioned." The 2d section requires that three copies of the rules of societies seeking such exemption, be submitted to the barrister appointed to certify the rules of friendly societies, and that his certificate be obtained.

The society in question is not a society "instituted for purposes of science, literature, or the fine arts, exclusively," within the meaning of the statute: and, if it were, the building in respect of which the exemption is claimed, is not so used by them as to entitle the society to such exemption: and, at all events, the exemption does not extend to those portions of the building which are rented by other societies that are not so certified.

1. To justify the exemption, two circumstances must co-exist,—one, that the society is established for the purposes mentioned in the act,—the other, that the building shall be used exclusively for those purposes, and shall be so certified by the proper officer. [*JERVIS*, C. J.—It is the society that is certified, not the building.] The certificate, though a *sine qua non*, is not conclusive. This exemption was allowed in *The Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868 (*E. C. L. R.* vol. 59), in the case of a society somewhat similar to this, called "The Birmingham New Library," and in *The Queen v. The Overseers of Manchester*, 20 *Law Journ.*, N. S., M. C. 118, 4 *New Sess. Cas.* 482, in the

case of "The Royal Manchester Institution:" but, in the first case, the point underwent very little discussion, and, in the second, its authority was not disputed. The *Queen v. Brandt*, 4 New Ses. Cas. 494, 20 Law Journ., N. S., M. C. 119, however, is expressly in point, and must *govern this case. There, a concert hall, called "The Manchester Concert Hall," was built by a concert society, with borrowed [*818 money, and vested in trustees to secure the repayment thereof, with interest, and, subject thereto, in trust for the society. The society consisted of a limited number of "members," who paid an annual subscription of 5*l.* 5*s.*, and of "quasi members," who paid an annual subscription of 2*l.* 12*s.* 6*d.* The subscriptions, after paying the current expenses of the institution, went to keep down the interest on the debt, and to pay off the principal. Among the expenses were, the purchase of an organ, of ornamental mirrors, and of other furniture of a very luxurious description. The building was used for the giving of concerts to the subscribers and parties admitted by tickets issued to the subscribers. The concerts are divided into "dress concerts" and "undress concerts," which are respectively subject to various regulations, particularly defining the class of ladies and gentlemen to whom the tickets shall be transferable, and the privileges of the quasi subscribers. Most of the vocal and instrumental performers are paid out of the funds of the society, while some of the members perform gratuitously. It was held, that the society was not exempt from liability to be rated, within the 6 & 7 Vict. c. 36, as a society instituted exclusively for the purposes of science and the fine arts; the primary object of the institution being the amusement of the members, and not the advancement of the art of music. So, here, though the books kept by the society are calculated for the advancement of science, still the primary object is the instruction and amusement of the members. [TALFOURD, J.—The question is, whether the statute applies to a joint-stock circulating library.]

2. Has the society so used or occupied the building as to entitle it to the exemption claimed? In *The *Queen v. Jones*, 8 Q. B. 719, [*814 (E. C. L. R. vol. 55), an unsuccessful attempt was made to bring the Religious Tract Society within the exemption. [TALFOURD, J.—The court in effect held, in that case, that theology was not literature.] In *The Queen v. Pocock*, 8 Q. B. 729 (E. C. L. R. vol. 55), it was sought to exempt the British and Foreign School Society; but the court held that it did not come within the meaning of the statute. The question again arose in the case of *The Queen v. The Baptist Missionary Society*, 10 Q. B. 884 (E. C. L. R. vol. 59). There, the society were assessed to a paving-rate, made under the metropolitan paving-act, 57 G. 3, c. xxix., as occupiers of a house and premises, the property of the society. The society is founded with the object of sending out missionaries for the conversion of the heathen. It is chiefly supported by voluntary contributions, and in part by the interest of a fund; and no member derives any private advantage from his connexion with it. The premises comprise various

apartments, the whole of which are required for the purposes of the society, but which are at times used by other societies of the same nature, who, in return, contribute a part of the expense of the lighting, warming, and cleansing of the premises; but the sum so contributed does not exceed the expense incurred in consequence of their use of the premises. The society prints reports and periodicals, which are stored on the premises, and occasionally sold there, but at less than their prime cost; the proceeds of such sales being carried to the credit of the society. It was held that the rate was good, for that there was, under the circumstances, a beneficial occupation by the society. Lord DENMAN, in delivering the judgment of the court, there says: "The case finds that other societies occupy portions of the premises from time to time, and that *815] such occupation or use is not afforded to them gratuitously, but, that, in return for it, they, by contributions among themselves, in certain proportions, pay for the lighting, firing, and cleansing the premises. It is stated, indeed, that this payment is no more than is expended on these objects; that is, that the appellants make no profit by it: But there is nothing more clear than that that circumstance is immaterial: if there be substantially a rent or return of a beneficial nature for the use of the premises, it is enough. Nor is it material that these societies are of themselves of a religious and charitable character: if such bodies occupy premises as lessees rendering rent, they are clearly rateable for such occupation." In *Purvis v. Traill*, 3 Exch. 344,† 3 New Sess. Cas. 459, 18 Law Journ. N. S., M. C. 57, it was held, that a society ("The Greenwich Society for the Acquisition and Diffusion of Useful Knowledge") instituted for purposes of science, literature, or the fine arts, is not exempt from rates, under this act, unless their premises are occupied *solely* for these purposes; and therefore, where such a society let their premises for other purposes, they were held liable to be rated, although the funds were applied to the objects of the institution. And PARKE, B., said: "Upon the true construction of this statute, there can be no exemption, if the society occupy for a purpose foreign to its original institution." [WILLIAMS, J.—Suppose the society occupied the premises exclusively for the purpose of the fine arts during one half of the year, and for literature during the other half, would they be exempt?] Clearly not.

Crowder (with whom was *Parry*), contra.—It is impossible fairly to distinguish this case from *The Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59). There, a *816] society called "The Birmingham New Library," was instituted for the purpose of taking in books and periodicals, to be read by any person choosing to become a subscriber; every subscriber to pay two guineas on becoming a member, and 20s. in advance annually, and to have the power of transferring his property in the library to any person who should submit to the laws of the society; no dividend, gift, division, or

bonus in money to be made to or between any of the members: and it was held, that, to constitute a society supported by voluntary contributions, within the 6 & 7 Vict. c. 36, it was necessary that the contributions should produce no kind of return to the contributors; and that neither the right given to every subscriber of transferring his share, nor the contingency, that, whenever the society might dissolve itself, there would ensue a division of its property among the members, made the society other than a society within sect. 1, viz. a society which "shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members;" and that the occupier of buildings used for the purposes of the society, was, under the above statute, exempt from poor-rate. That was acted upon in *The Queen v. The Overseers of Manchester*, 4 New Sess. Cas. 482, 20 Law Journ., N. S., M. C. 118. The court must be prepared to overturn those two cases, if they hold this society not to be entitled to the benefit of the statute. [JERVIS, C. J.—My brother *Channell* says that those cases are overruled, or at least materially qualified, by the subsequent case of *The Queen v. Brandt*, 4 New Sess. Cas. 494, 20 Law Journ., N. S., M. C. 119.] It clearly was not the intention of the court, in the last-mentioned case, in any degree to impugn the authority of the former cases. On the contrary, Lord CAMPBELL expressly distinguishes them. **"We look upon this institution,"* he says, (a) *"as totally differ-* [817
ent from 'The Birmingham Library,' or 'The Manchester Institution,' where the members, not with a view to their own gratification, but to the good of others, by cultivating in them a taste for literature, science, and the fine arts, subscribed money, and contributed their personal trouble, and may, therefore, be fairly supposed to be objects of the special favour of the legislature, at the cost of their fellow parishioners."

It is said that the society loses the benefit of the statutory exemption, because the whole of the premises are not devoted to its purposes. But the case finds that the other societies by whom portions of the building in St. James's Square are occupied, are scientific societies within the purview of the statute. [CRESSWELL, J.—But not certified at the time the rate in question was made. They, therefore, could not claim the exemption.] The occupation by them is an occupation by "The London Library." At all events, the rate should be amended, so as to give the appellants the benefit of the exemption as to so much of the house as is occupied exclusively for their purposes.

Channell, Serjt., in reply, was stopped by the court.

JERVIS, C. J.—In dismissing this appeal, I adopt the language of Lord CAMPBELL, in *The Queen v. Brandt*, 4 New Sess. Cas. 500, and "trust that this society may long flourish, paying its rates." The case, as it seems to me, is precluded by the authorities. The first question

to be considered, is, whether "The London Library" is a society established exclusively for purposes of science, literature, or the fine arts, within the 5 & 6 Vict. c. 36. Whatever we might have been inclined *818] to think, had the question now for the first time arisen, it seems to me that we are conclusively bound by the decision of the Queen's Bench in *The Churchwardens, &c., of Birmingham v. Shaw*, recognised and confirmed by *The Queen v. The Overseers of Manchester*, where it was held, that a society like this, supported by the annual subscriptions and voluntary contributions of its members, is within the statute. It is better to adhere to decided cases, than to speculate as to the meaning of an act of parliament. The second point in the case, is met by an express authority. The Philological Society and The Statistical Society not having been certified under the statute at the time the assessment was made, the case is brought precisely within *Purvis v. Traill*, where PARKE, B., says—"Suppose the society converted two-thirds of their premises into butchers' and bakers' shops, would they not be liable to be rated, notwithstanding they expended the profits in the purchase of globes and astronomical instruments? The section must mean occupied *exclusively* for the purposes of the society. Here, the society occupy partly for one purpose, and partly for another." We are, therefore, met by authority upon both points; and it would be enough to stop there. But, in answer to the suggestion that the rate may be amended, I would observe that we are not entitled to look at the objects of the under-tenants. The house is let to The London Library. The act of parliament exempts them from rates, if they occupy the premises for the transaction of their business, and for carrying into effect the purposes of the society, that is, of the society which would otherwise have been liable as occupying tenants. If they receive rent for any portion of the premises, they are not within the protection of the act. For these reasons, I am of opinion that the respondents are entitled to judgment.

*819] *CRESSWELL, J.—I also think that the respondents are entitled to judgment. It is decided that a society such as upon the statement submitted to us this appears to be, is within the meaning of the statute, a society instituted for the exclusive purposes of science, literature, or the fine arts, supported wholly or in part by annual voluntary contributions. But it appears that this society is in possession of a house, certain parts of which are not occupied by it for the transaction of its business and for carrying into effect its purposes, but are let to others at certain rents. It may be that those others are societies of the description contemplated by the statute; but the purposes of those societies are not the purposes of the society in question.

WILLIAMS, J.—I am of the same opinion. The appellants claim exemption from rates on the ground that they are a society instituted for purposes of science, literature, or the fine arts exclusively, within the

meaning of the statute, and that they occupy the premises in question for the transaction of the business of the society, and for carrying into effect its purposes. Assuming that the society is within the statute, the question is whether the premises are occupied by it so as to entitle the appellants to the exemption. Upon the facts, I think it is quite clear that the society does not occupy the premises *solely* for the transaction of its business and for carrying into effect its purposes. If any authority were needed, the case of *Purvis v. Traill* is completely in point. If an exemption could be claimed under such circumstances as these, a society of this sort might take any premises, however large, and under-let what they could not use, upon more advantageous terms, by reason of the supposed exemption of their undertenants from rates. That never could have been contemplated by the statute.

*TALFOURD, J.—Whatever might have been my opinion had the matter been *res integra*, I feel bound by the authority of *The Churchwardens, &c., of Birmingham v. Shaw*, and *The Queen v. The Overseers of Manchester*, which are decisive to show that this society fulfils the first condition upon which the right to exemption from rates depends. But I think it clearly fails as to the second. *The Queen v. Brandt* and *Purvis v. Traill* are decisive upon that point. [*820]

Channell prayed judgment for costs. [JERVIS, C. J.—What has been the practice of the other courts as to costs?] In the case of *The Churchwardens of the Holy Trinity, Exeter, v. Ide*, 16 *Law Times*, 363, costs were given.

Parry, contrà.—There cannot be said to be any practice upon the subject: the statute under which the case is stated, is the 12 & 13 Vict. c. 45, s. 11, which enacts, “that, at any time after notice given of any appeal to any court of general or quarter sessions of the peace, against any judgment, order, *rate*, or other matter (except an order in bastardy, or a proceeding under or by virtue of any of the statutes relating to Her Majesty’s revenue of excise or customs, stamps, taxes, or post-office), for which the remedy is by such appeal, it shall be lawful for the parties, by consent, and by order of any judge of one of the superior courts of common law at Westminster, to state the facts of the case in the form of a special case for the opinion of such superior court, and to agree that a judgment in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered, on motion by either party, at the sessions next or next but one after such decision shall have been given; and such* judgment shall and may be entered accordingly, and shall be of the same effect in all respects [*821] as if the same had been given by the court of general or quarter sessions upon an appeal duly entered and continued.” If this had been an appeal at sessions, there would have been no costs.

Channell, Serjt., stated that he had been informed that the costs allowed in the case referred to were taxed as between party and party.

JERVIS, C. J.—The officer will inquire as to the practice of the other courts, and draw up the rule accordingly, and also to amend the rate.

The rule was afterwards drawn up dismissing the appeal, with costs, to be paid by the appellants *as between party and party*.

DAVIS v. BURRELL and LANE. April 17.

Where a lessee covenants to pay rates and taxes, no demand is necessary, to constitute a breach, so as to entitle the lessor to avail himself of the proviso for re-entry.

TRESPASS for an assault and false imprisonment.

Pleas,—first, not guilty “by statute,”—secondly, that the defendant Burrell, at the said time when, &c., was lawfully possessed of the premises in which, &c., and, being so lawfully possessed, the plaintiff, with divers other persons, were committing a breach of the peace, and endeavouring to beat in and break the doors of the said premises, and to effect a forcible entry therein; and that thereupon the defendants, to prevent the plaintiff’s further proceeding in that breach of the peace, then gave the plaintiff into custody, as they lawfully might for the cause *822] aforesaid,—thirdly, that the defendant *Burrell was lawfully possessed of and in a certain part of a certain yard, and certain stables adjoining thereto, and that the plaintiff entered the yard, with other persons, and made a great noise and disturbance, and used violent and threatening language, and disturbed the defendant Burrell in the peaceable possession of the said yard, in breach of the peace, &c., and that thereupon the defendants, in order to preserve the peace, gave the plaintiff in charge to a police-constable, as they lawfully might, &c.

The plaintiff joined issue on the first plea, and replied *de injuriâ* to the other two.

The cause was tried before JERVIS, C. J., at the sittings at Westminster, after the last term. The facts that appeared in evidence were as follows:—The plaintiff had been tenant to the defendant Burrell of a public-house, yard, stables, and coach-house, in Catherine Wheel Yard, Great Windmill Street, under a demise for twenty-five years from the 25th of December, 1842, at the yearly rent of 175*l.*, payable quarterly, originally made to one Smith, who had assigned his interest in the premises to Burrell. The lease contained the usual covenants on the part of the lessee and his assigns, to repair and paint, and to pay rent, rates, and taxes, and also a covenant to yield up the fixtures to the lessor at the expiration of the lease, with a proviso for re-entry for breach of any of the covenants. On the 25th of April last, Burrell, during the temporary absence of the plaintiff’s servant, who had charge of the premises, re-entered under the proviso, for alleged breaches of covenant,

in omitting to repair and paint, removing fixtures, and not paying rates, and put padlocks on the gates and outer door. The plaintiff thereupon came to the premises accompanied by several men, and attempted to force their way in; whereupon the defendants gave the plaintiff in charge to a police-constable who was present when the attempt was being made, and who carried him to the police-station, *where he was charged by the defendants with "wilfully breaking off [*823 some locks from some doors in Catherine Wheel Yard, Great Windmill Street."

The justification, so far as related to the non-repair, removal of fixtures, and non-payment of rent, failed; but it was proved, on the part of the defendants, that, at the time the defendant Burrell re-entered, two poor-rates were payable in respect of the premises, though there was no evidence of their having been demanded of the plaintiff.

It was thereupon contended, on behalf of the defendants, that, Burrell being lawfully in possession, the defendants were justified, under the circumstances, in giving the plaintiff into custody, by the metropolitan police act, 2 & 3 Vict. c. 47, s. 54, div. 10, and s. 66.(a)

In leaving the case to the jury, the chief justice said, that breaking locks or breaking the peace in the presence *of the constable, [*824 would authorize the latter to take the plaintiff; but that here the constable did not seem to have acted of his own authority, but under the direction of the defendants, and therefore the question would be whether or not Burrell was lawfully in possession. "Then," said his lordship, "was Burrell in possession? The defendant's counsel says there are three ways in which he may have been so under the proviso for re-entry,—for non-repair,—for non-payment of rates,—and for not painting. The plaintiff has covenanted to yield up the fixtures to the defendant Burrell at the end of his lease, and he has removed some; but the Court of Common Pleas has held that such removal gives no right of re-entry, for, they may be restored before the expiration of the term; and I shall hold so: but fixtures may be so carelessly and improperly removed as to amount to a breach of the covenant to repair. If you

(a) The 54th section enacts "that every person shall be liable to a penalty not more than 40s., or, within the limits of the metropolitan police district, shall, in any thoroughfare or public place, commit any of the following offences, that is to say," (amongst others) Div. 10, "Every person who, without the consent of the owner or occupier, shall affix any posting bill or other paper against or upon any building, wall, fence, or pale, or write upon, soil, deface, or mark any such building, wall, fence, or pale, with chalk or paint, or in any other way whatsoever, or wilfully break, destroy, or damage any part of any such building, wall, fence, or pale, or any fixture or appendage thereunto, or any tree, shrub, or seat, in any public walk, park, or garden,"—"And it shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who shall commit any such offence within view of any such constable."

And s. 66 enacts "that any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law."

find want of repair, the defendant had a right to enter; he would then be lawfully in possession; and in that case I shall direct a verdict for the defendants on the general issue, under the 2 & 3 Vict. c. 47. *So, if you find that the rates were in arrear.* As to the second plea, the question is, was the plaintiff on the premises making a noise and disturbance. As to the painting, it is not in my opinion a continuing covenant; but it is better to have your opinion upon it."

The jury found that the premises were sufficiently repaired and painted; but that the rates were in arrear, and that the plaintiff was there creating noise and disturbance; and they assessed the damages contingently at 5*l*.

The chief justice then said,—“I think, that, as the rates were in arrear, the defendant Burrell was entitled to enter, that he was therefore properly in possession, and entitled to a notice of action. The verdict must be entered for the defendants on the general issue.”

*825] *Prentice* now moved to enter a verdict for the plaintiff with 5*l*. damages, or for a new trial, on the ground of misdirection.—There was no proof that the rates had been demanded; and, until demand and refusal, there could be no breach of covenant. In *Hurrell v. Wink*, 2 J. B. Moore, 417 (E. C. L. R. vol. 4), 8 Taunt. 369 (E. C. L. R. vol. 4), in replevin for taking the plaintiff's goods, the defendant avowed, as overseer of the poor, under the 48 Eliz. c. 6, by virtue of a warrant of distress for 10*l*. 17*s*., due for several rates, one of which had been quashed on the ground that the plaintiff was not an occupier within the parish where he was rated; and it was held, that, as one of the rates was quashed, the warrant was void, and that the precise sum due for poor-rates should have been demanded from the plaintiff previously to the issuing of such warrant. [CRESSWELL, J.—All that that case decides, is, that there must be a demand of the precise sum due, before the rate is distrained for. JERVIS, C. J.—How can the omission of the collector prejudice the landlord?] There could be no default until demand. [JERVIS, C. J.—The rate was due and payable when it was published at the church. CRESSWELL, J.—A demand is only necessary, to justify a distress.] Burrell's possession was not obtained in a lawful manner. In *Newton v. Harland*, 1 M. & G. 644 (E. C. L. R. vol. 39), 1 Scott, N. R. 474, it was held, that, where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession, by expelling him. [CRESSWELL, J.—The doctrine of that case has been very much questioned.]

JERVIS, C. J.—The question resolves itself into one of fact. If the rates were due, and were not paid, the defendant Burrell was lawfully in possession of the premises at the time the plaintiff made the forcible *826] attempt to get in. When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it. Here, the plaintiff has entered into a covenant to pay rates,

and he has broken that covenant. The statute 43 Eliz. c. 6, requires a personal demand before the rate can be distrained for. That shows that a demand would otherwise be unnecessary. I am of opinion that there should be no rule.

CRESSWELL, J.—I am entirely of the same opinion.

WILLIAMS, J.—The plaintiff was bound by his covenant to pay the rates. There was no necessity for a personal demand.

TALFOURD, J.—There was an absolute covenant to pay all rates and taxes; not conditional upon their being lawfully demanded. There was a clear breach, and consequently the lessor had a right to re-enter.

Rule refused.

*BOOTH v. CLIVE. April 24.

[*827

The 138th section of the county-courts act, 9 & 10 Vict. c. 95, enacts, that, in actions and prosecutions to be commenced against any person for anything done in pursuance of the act, notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action.

In case against a judge of a county-court for making an order for committing the plaintiff to gaol for disobedience of an order for payment of certain instalments, after due service upon him of a writ of prohibition, the jury were told, that, if the defendant acted under a *bond fide* belief that his duty as judge of the county-court rendered it incumbent on him to do so notwithstanding the prohibition, the act must be considered as done in pursuance of the county-court act, and he was entitled to notice of action:—Held, no misdirection.

Where, in such a case, the judge, in the presence of the counsel, directs a verdict for the defendant, but at the same time tells the jury to assess damages for the plaintiff contingently, and the counsel do not object,—it is not competent to the plaintiff afterwards to move for a new trial on the ground of misdirection: he can only move to enter a verdict for the damages so contingently assessed.

THIS was an action upon the case against the judge of the Southwark County-Court of Surrey, for maliciously issuing an order for the imprisonment of the plaintiff, after service of a writ of prohibition.

The second count of the declaration stated, that, before and at the time of the committing of the grievance thereinafter mentioned, the defendant was the judge of an inferior court of record, to wit, the Southwark County-Court of Surrey, in which court a judgment had been recovered against the now plaintiff, in a cause wherein one W. G. Sill was plaintiff, and the now plaintiff was defendant; that, before and at the time of the committing of the said grievance, to wit, on the 26th of February, 1850, a writ of prohibition had been duly issued out of Chancery, prohibiting the judge of the said court, and also the clerk and high-bailiff and officers thereof, from proceeding or carrying into execution, or in any wise giving effect to, or proceeding upon, the said judgment,—which said writ the plaintiff, to wit, on the said 26th of February, 1850, caused to be made known to the defendant as judge of the said county-court, and *then caused a copy thereof to be left with the defendant; and it then became the duty of the defend- [*828

ant, as such judge, to refrain from proceeding or carrying into execution, or in any wise giving effect to or proceeding upon the said judgment, according to the tenor and effect of the said writ; yet the defendant, not regarding his duty in that behalf, and intending to injure the plaintiff, did not refrain from proceeding upon the said judgment, but, on the contrary, maliciously, and without reasonable and probable cause, made an order founded upon the said judgment, that the plaintiff should be committed for one month to Horsemonger Lane Gaol, for neglecting to pay 2*l*. alleged to be due and payable by the now plaintiff for and in respect of two instalments of the said debt and costs recovered by the said judgment. The count then proceeded to aver special damage resulting to the plaintiff from such imprisonment.

The defendant pleaded,—first, not guilty,—secondly, that the grievances in the declaration mentioned were committed by the defendant after the passing of the statute 9 & 10 Vict. c. 95, and were, and each of them was, done in pursuance of the said act, and by the defendant acting in execution of the said act, and that no notice in writing of the action, and of the cause thereof, was given to the defendant one calendar month before the commencement of the suit, pursuant to the said statute,—verification.(a)

The plaintiff replied to the second plea, that the grievances in the declaration mentioned were not, nor was either of them, done in pursuance of the said act. Issue thereon.

The cause was tried before JERVIS, C. J., at the sittings at Westminster after last Hilary term. It appeared that an order had been duly made by the defendant, as judge *of the Southwark County-Court, *829] for payment by Booth, by instalments, of a debt and costs recovered against him in that court by one Sill. Booth afterwards obtained his discharge under the insolvent debtors' act as to the debts mentioned in his schedule, including Sill's judgment. The order of adjudication was produced before the judge, but he declined to give effect to it, and made an order committing the now plaintiff to Horsemonger Lane Gaol. for one month, for non-payment of two instalments of 1*l*. each.

Booth afterwards obtained a writ of prohibition out of the petty-bag office, which was duly served upon the judge, but he refused to obey it, and Booth was accordingly arrested under the order, and committed to prison.

No notice of action had been given to the defendant, pursuant to the 9 & 10 Vict. c. 95, s. 138.

The lord chief justice told the jury, that, if the defendant, in making the order, acted under the *bond fide* belief that his duty as judge of the county-court rendered it incumbent on him to do so notwithstanding the prohibition issued out of the petty-bag office, the act done by him

(a) There were other pleas, which it is unnecessary to advert to.

must be considered as done in pursuance of the county-court act, and that he was entitled to notice of action.

Being pressed by the counsel for the plaintiff to leave to the jury the further question, whether the defendant *reasonably believed* it to be his duty to proceed, his lordship told them, that, if "reasonably" meant anything else than "in good faith," it meant, "according to his reason," as contradistinguished from "caprice."

The jury found a verdict for the defendant,—assessing the damages contingently at 40s.; for which sum the lord chief justice reserved leave to the plaintiff to enter a verdict, if the court should be of opinion that the defendant was not entitled to notice of action.

**Humfrey* (with whom was *Skinner*), on a former day in this term, moved for a new trial, on the ground of misdirection. [*830
[CRESSWELL, J.—You can only ask for a rule in the terms in which the leave was reserved. *Morrish v. Murrey*, 13 M. & W. 52,† 2 D. & L. 199, is an authority for that. That was trespass for breaking and entering the plaintiff's dwelling-house. The judge, at the trial, having ruled that a plea justifying the entry of the plaintiff's house, the outer door being open, to search for one C. F., who for six months had resided in the plaintiff's house, and that the defendant (a sheriff's officer) had good grounds to suspect and believe that she was in the plaintiff's house at the time, had been proved, and constituted a good defence, stated, in the presence of counsel on both sides, who made no objection, that he should direct the jury to assess the damages contingently, and should give the plaintiff leave to move to enter a verdict for the amount found by the jury,—it was held, that both parties were bound thereby, and that the plaintiff's counsel was not at liberty to move for a new trial, for misdirection.] The real question is, whether, under the circumstances, the defendant was entitled to a notice of action. That question turns upon the 138th section of the 9 & 10 Vict. c. 95, which, "for the protection of persons acting in the execution of the act," enacts "that all actions and prosecutions to be commenced against any person for anything done *in pursuance of this act*, shall be laid and tried in the county where the fact was committed,(a) and shall be commenced within three calendar months after the fact committed, and not afterwards or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one *calendar [*831 month at least before the commencement of the action; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant." [JERVIS, C. J.—The words "in pursuance of this act" must receive the same construction as "in execution of or under the authority of this act," in *Cook v. Leonard*,

(a) See *Lawson v. Dumbin*, 9 Com. B. 54 (H. C. L. R. vol. 68).

6 B. & C. 351 (E. C. L. R. vol. 13), 9 D. & R. 339 (E. C. L. R. vol. 22).] The subject underwent much discussion in *Hughes v. Buckland*, 15 M. & W. 346,† 3 D. & L. 702, where PARKE, B., says: "The act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in *strict* pursuance of the act, because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must *bona fide* and *reasonably* believe himself to be authorized by the act." [WILLIAMS, J.—The defendant here was acting in the supposed performance of his duty to the plaintiff in the county-court. Does not that bring him within the protection of the act?] Clearly not, unless he was acting reasonably. The definition of that word, as given by the chief justice, was not the correct one, viz. that it must be taken to mean "according to his reason," as contradistinguished from "capricious." [JERVIS, C. J.—I left it to the jury to say whether the defendant acted *bona fide*. WILLIAMS, J.—In *Horn v. Thornborough*, 3 Exch. 846,† it was held, that a person who causes the apprehension of another for a malicious trespass to property of which the former is the reversioner only, is entitled to notice of ac-
 *832] tion under the malicious trespass act, 7 & 8 G. 4, c. *80, if he causes such apprehension under a *bona fide* belief that he is acting in pursuance of the statute. I observe Baron PARKER in that case omits the word "reasonably." JERVIS, C. J.—Mr. Baron ROLFE says: "I am reported to have said, in *Hughes v. Buckland*, and I have no doubt correctly, that 'all who *bona fide* and *reasonably* think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected;' and that is a position which has been adopted by the Court of Queen's Bench. In fact, a man's reasonably believing himself to be the owner of the property injured, is one ingredient in enabling us to arrive at the conclusion as to his *bona fides*." CRESSWELL, J.—That is very like Lord TENTERDEN's use of "reasonable care and caution,"—only as an ingredient towards showing good faith. In *Wedge v. Berkeley*, 6 Ad. & E. 668 (E. C. L. R. vol. 38), 1 N. & P. 665 (E. C. L. R. vol. 36), there was no reasonable ground of suspicion, and yet the magistrate was held entitled to notice under the 24 G. 2, c 44, s. 1.] In *Hopkins v. Crowe*, 4 Ad. & E. 774 (E. C. L. R. vol. 31), 7 C. & P. 373 (E. C. L. R. vol. 25), a hired driver of a cabriolet, having brought home a horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse: the policeman said, that, if the complainant charged the driver with cruelty to the horse, he would take him into custody; the complainant said "I do;" and the policeman apprehended the driver, under the 5 & 6 W. 4, c. 59, s. 9: and it was held, that the complainant must be considered, not as a party giving information

to the officer, in consequence of which the plaintiff was arrested, but as a principal causing the arrest to be made: and that he was not entitled to notice of action, which the statute required to be given to persons sued for anything done in pursuance of it. There, *the defendant really believed that he was acting in pursuance of the act, but not upon such ground as a reasonable man would found his belief upon. *Kine v. Evershed*, 10 Q. B. 148 (E. C. L. R. vol. 59), is an authority to the same effect. Can the defendant here be said to have been acting in pursuance of the act, after the prohibition was served upon him? From that moment, he had no power to act under the statute: the proceeding was *coram non judice*: *Bevan v. Prothesk*, 2 Burr. 1151. This prohibition issued from the petty-bag office is just as binding and obligatory upon the judge of the county-court, as if the matter had been heard and adjudicated upon before the lord chancellor. [JERVIS, C. J.—Notwithstanding it was afterwards set aside by the Court of Queen's Bench?] Yes. Speaking of a writ of prohibition which had been said to have been irregularly issued, Lord ELDON, in *Iveson v. Harris*, 7 Ves. 251, 254, says: "If the practice of this court, founded upon the orders of the chancellor, has been, that a prohibition should issue upon such an affidavit, it is to be considered whether that practice shall continue, or be corrected according to this case in *Peere Williams*.(a) But, whether right or wrong, it is clear this court can hardly hear an inferior court discuss with it, for any purpose but to have the proceeding superseded, the question whether it issued improvidently. That is a question for the consideration of the court out of which the writ issued, not of the court to which it is addressed. It is of the last consequence not to suffer a breath of doubt to hang upon this point,—that an inferior court is not to disobey any of the writs issuing out of this court, upon their notion that the writ issued improvidently. Therefore, though this writ might have improvidently issued, *I should without doubt have held a proceeding in breach of it a [*834 contempt."

CRESSWELL, J., now delivered the judgment of the court.—After stating the pleadings, *ut antè*, the learned judge proceeded:—

The lord chief justice told the jury, that, if the defendant, in making the order, acted under the *bond fide* belief that his duty as judge of the county-court rendered it incumbent on him to do so, notwithstanding the prohibition issued out of the petty-bag office, the act done by him must be considered as done in pursuance of the county-court act, and that he was entitled to notice of action: and, being pressed to leave to the jury the further question, whether the defendant *reasonably* believed it to be his duty to proceed, he told them, that, if "reasonably" meant anything else than "in good faith," it meant, "according to his reason," as contradistinguished from "caprice."

(a) Anonymous, 1 P. Wms. 476.

A great many cases were mentioned yesterday by Mr. *Humfrey*, in which the right to notice of action has been discussed: and, at first sight, it seems difficult to reconcile all the expressions used by the judges in dealing with those different cases; but, upon examination, the difficulty is rather seeming than real, and arises from the circumstance that language used by the judges with reference to the particular case then before them, has been afterwards quoted as used generally. Thus, in some cases, we find judges saying that the party claiming notice of action, because the act imputed to him was done in a particular character, or in the exercise of some particular authority, did such act either having or not having reasonable ground for believing that he filled *835] that character or had that authority, when *it is manifest that the meaning of the words used by them, is, that the party must, according to the evidence, be assumed to have acted under, or without, the *bonâ fide* belief that he fulfilled the character, or had the authority, then in question. In other cases, the judges have said that the real question is, whether the party *bonâ fide* believed so and so, and acted under that belief. Now, although there is a difference in the terms used, there is no difference in the principle laid down in these cases. And we apprehend that the true principle by which we must be guided in disposing of this application, is this,—did the defendant try the cause, honestly believing that his duty as judge under the county-court act called upon him to do so?

The last case on the subject,—*Horn v. Thornborough*, 3 Exch. 846,†—illustrates the view above taken of the whole series of authorities. There, a *reversioner* caused a party to be apprehended under the malicious trespass act, 7 & 8 G. 4, c. 30. Trespass was brought against him; and he pleaded not guilty “by statute.” No notice of action was given. The Court of Exchequer held that he was entitled to notice of action, provided he *bonâ fide* believed that he was acting in pursuance of the statute,—which is strictly in accordance with the ruling of the lord chief justice in the present case. It is remarkable that PARKE, B., mentions *Hughes v. Buckland*, 15 M. & W. 346,† 3 D. & L. 702, as a decision that the protection afforded by the statute then under consideration is extended to all persons who have a *bonâ fide* belief that they fill the character mentioned in the statute, and act *bonâ fide* under that belief. But *Hughes v. Buckland* was pressed upon us by Mr. *Humfrey* as an authority for holding that *bonâ fide* belief will not suffice, unless *836] it is founded upon reasonable *grounds. Lord CRANWORTH, in his judgment, alludes to the use of the word “reasonable” in the former case, and explains it as being an ingredient in enabling the court to arrive at a conclusion as to his *bona fides*. And it does not appear to have been used in any sense at variance with this, by the Court of Queen’s Bench, in *Kine v. Evershed*, 10 Q. B. 143 (E. C. L. R. vol. 59). The defendant there was tenant of a house, and attorney to the mort-

gagee, and gave the plaintiff into custody on a charge of wilfully damaging the house. The learned judge who tried the cause asked the jury *whether the defendant acted bonâ fide in apprehending the plaintiff, or whether the charge was colourable*. They found that he acted *bonâ fide*: whereupon the judge directed a nonsuit. The court, in giving judgment; on a rule for a new trial, observed that "the jury were asked whether the defendant acted *bonâ fide*, or whether, on the other hand, his proceeding was colourable or malicious; no question being put to them as to his being the servant, or having authority from the mortgagee, or reasonably believing himself to be in either of those positions:" and ultimately the court held that "they should have been asked, not only as to the *bona fides* of the defendant, but as to his reasonable belief that he was servant of, or had the authority of, the mortgagee."

Now, the *bona fides* there meant, is, the *bona fides* upon which the jury had been asked their opinion, viz., whether it was an honest charge, as opposed to a colourable charge. And the *reasonable* belief afterwards mentioned, is equivalent to *bonâ fide* belief that he was servant, or had authority. And that makes the case consistent with the opinion of the Court of Exchequer in *Horn v. Thornborough*, and with many earlier decisions, such as *Wedge v. Berkeley*, 6 Ad. & E. 663 (E. C. L. R. vol. 33), 1 N. & P. 665 (E. C. L. R. vol. 36).

*The case of *Hopkins v. Crowe*, 4 Ad. & E. 774 (E. C. L. R. vol. 31), 7 Car. & P. 373 (E. C. L. R. vol. 32), is not at variance with this view of the subject. The 5 & 6 W. 4, c. 59, gave authority to the owner of a horse to give in charge a person guilty of cruelty towards it. The defendant was the son of the owner of a horse that had been ill-used, and gave the party in charge: it was held that he must be taken to know the law, viz. that the *owner* was the party authorized, and that he had not, and could not have, any reasonable ground for believing himself owner, and therefore was not protected. There, the absence of all reasonable ground for such belief, was a sufficient ground for holding that the defendant did not act under *that belief*; and a *bonâ fide* belief of that was necessary to give him the statutory protection.

We, therefore, think that the direction of the lord chief justice was right, and ought not to be disturbed; and the plaintiff can have no rule.

Rule refused.(a)

(a) See *Davis v. Burrell*, *antè*, p. 821.

*888] *THE ELECTRIC TELEGRAPH COMPANY v. BRETT
and LITTLE. April 26.

A claim for a patent for improvements in the mode of doing something by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries not known at the time of the claim, so long as it remains identical with regard to improvements claimed, and their application.

In case for the infringement of a patent "for improvements in giving signals and sounding alarums in distant places, by means of electric currents transmitted through metallic circuits," the breaches alleged in the declaration were, that the defendant had used and counterfeited the said invention: the evidence was, that the defendant had used or counterfeited *part* only. The specification described *nine* several improvements:—Held, that the declaration, in speaking of the said invention, was to be understood as charging the using or counterfeiting of the said *nine* improvements, and that it was sufficiently proved by showing that *one* of them had been used.

The patentees' invention was described, as well in the title of the letters-patent, as in the specification, as an invention of "improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through *metallic circuits*." The defendant, it appeared, arrived at the same results by using a circuit not *wholly* or continuously metallic throughout, but by using the *earth*, to an extent nearly amounting to the half, as the connecting medium between two portions of the metal. It appeared in evidence, that, after the grant of the letters-patent, it had been discovered that a large portion of the wire through which the electric current returned to the battery might be dispensed with, by plunging into the earth the two ends of wire which would have been joined by the parts left out, the electric current passing from one end of the wire to the other as effectually as if a continuity of wire had been kept up:—Held, that, though a circuit upon this principle would not be *wholly metallic*, yet, inasmuch as it was so in all that part which formed the substance of the patentees' claim, viz., that part which gave the signals, it amounted to an infringement of the patentees' right.

The patent was for an improved method of giving signals, by means of *several* wires and converging needles pointing to letters. The defendant had used *one* wire, and had made signals by counting the deflections of a needle or needles,—which was found by the jury to be a different system from that of the plaintiffs:—Held, that, notwithstanding this finding, the plaintiffs were entitled to the verdict; for, that the specification showed that the patent was not for a *system* of giving signals, but for certain distinct and specified improvements, comprehending those in question,—the *system* being described only for the purpose of explaining the improvements claimed.

One of the patentees' improvements was described as an improvement "whereby a set of combined conducting wires, as aforesaid, having a voltaic battery, and a set of buttons or finger-keys, and also a dial with metallic needles, for giving signals, as well as an apparatus for sounding alarums at each end of the set, may also have duplicates of such dials, with needles and apparatus for alarums, at intermediate places between the two ends; all such duplicates operating simultaneously with each other, and with the two end dials and alarums, to give like signals, and to sound like alarums." The jury found that, "the sending of signals to intermediate stations was new to the plaintiffs," that is, was a new invention of the patentees:—Held, that this was the fit subject of a patent; for, though it might be probable, *a priori*, that a circuit having a distant coil could have intermediate ones also, which would operate in the same manner, still it was matter of experiment that it could practically be done:—Held, also, that the patentees' claim was not affected by the circumstance of the defendants having improved upon it, so as to enable those at the intermediate stations to *send* as well as to *receive* communications.

THIS was an action upon the case by the plaintiffs as assignees of certain letters-patent granted in the year 1837, to William Fothergill
*839] Cooke and Charles *Wheatstone, for "improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits."

The declaration recited the letters-patent, and also an indenture of

the 1st of December, 1845, whereby Wheatstone assigned to Cooke his share in the patent,—an indenture of the 23d of December, 1845, whereby Cooke assigned to John Lewis Ricardo twelve thirty-second parts or shares in the patent,—an indenture of the same date, whereby Cooke assigned to George Parker Bidder eleven thirty-second parts or shares therein,—and an indenture of the 5th of August, 1846, between Cooke of the first part, Ricardo of the second part, Bidder of the third part, and The Electric Telegraph Company of the fourth part, whereby Cooke, Ricardo, and Bidder assigned their several interests in the patent to the plaintiffs: it then alleged that the defendants, after the making of the several indentures, and after the passing of the act incorporating The Electric Telegraph Company,^(a) wrongfully, &c., did use and put in practice *the said invention* in the said letters-patent mentioned, and did counterfeit and imitate the said invention, and did counterfeit, imitate, and resemble the said invention, and did make divers additions to and subtractions from the same whereby to pretend themselves to be the inventors and devisors of the said invention, in breach of the letters-patent, &c.

*The defendants craved oyer of the letters-patent and of the several indentures of assignment in the declaration mentioned, [*840 and pleaded,—first, not guilty.

Secondly, that Wheatstone did not assign and transfer to Cooke the moiety of him Wheatstone of and in the said letters-patent, as in the declaration alleged.

Thirdly, that Cooke did not assign to Ricardo twelve thirty-second shares of and in the letters-patent, as in the declaration alleged.

Fourthly, that Cooke did not assign to Bidder eleven thirty-second shares of and in the letters-patent, as in the declaration alleged.

Fifthly, that Cooke, Ricardo, and Bidder did not assign to the plaintiffs the said letters-patent, as in the declaration alleged.

Sixthly, that, before the making and passing of the said act of parliament, to wit, on the 17th of June, 1846, the said letters-patent became and were in trust for more than the number of twelve persons, contrary to the true intent and meaning of the proviso in that behalf in the said letters-patent contained,—verification.

Seventhly, that no memorial of the names and descriptions of the several shareholders of the said company, in the form or to the effect for that purpose given or expressed in the schedule to the said act annexed, was at any time after the passing of the said act, and before the commencement of this suit, verified by the declaration of any director, secretary, or officer for the time being of the said company, made before a master or master extraordinary in Chancery, and, when so verified, enrolled in the High Court of Chancery in England, in manner and form as in the said act required,—verification.

(a) 9 & 10 Vict. c. xlv.

Eighthly, that though, after the making and passing of the said act, and before the commencement of this suit, to wit, on the 28th of October, 1846, the said company did, in pretended compliance with the said *841] act, cause and *procure a certain pretended memorial of the names and descriptions of the several shareholders of the said company, in the form or to the effect for that purpose given or expressed in the schedule to the said act annexed, to be verified by the declaration of some director, secretary, or officer for the time being of the company, made before a master or master extraordinary in Chancery, and, when so verified, enrolled in the High Court of Chancery in England, in manner and form as by the said act required; yet that the said company did knowingly and wilfully omit, and cause and procure to be omitted, and there were omitted, from such pretended memorial so verified and enrolled as in that plea mentioned, the names of divers persons who before and at the time of such verification and enrolment were shareholders of the said company, contrary to the true intent and meaning of the said act, and in fraud of the provisions thereof; and that no memorial of the names and descriptions of the shareholders of the said company, in the form or to the effect for that purpose given and expressed in the schedule to the said act annexed, other than such pretended memorial so verified and enrolled as in that plea before mentioned, had at any time since the making and passing of the said act, and before the commencement of this suit, been verified by the declaration of any director, secretary, or officer for the time being of the said company, made before a master or master extraordinary in Chancery, and, when so verified, enrolled in the High Court of Chancery in England, in manner and form as in the said act required,—verification.

Ninthly, that Cooke and Wheatstone were not the true and first inventors of the said improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits, in manner and form as in the declaration alleged.

*842] Tenthly, that the said alleged invention of certain *improvements in giving signals and sounding alarums in distant places, was not, at the time of making the said letters-patent, a new invention within the realm,—verification.

Eleventhly, that Cooke did not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, as in the declaration alleged.

Twelfthly, that the said invention of improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits, was not, nor is, the working or making of any manner of new manufacture, according to the true intent and meaning of the statute in that behalf made and provided,—verification.

Thirteenthly, that the said letters-patent were prejudicial and incon-

venient to the subjects of our lady the Queen, in this, to wit, that the said alleged inventions of certain improvements in giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits, was altogether useless, and the same had been abandoned as of no use, benefit, or advantage to the public, by Cooke and Wheatstone and the plaintiffs, before and at the time of the committing by the defendants of the alleged grievances in the declaration mentioned,—verification.

Fourteenthly, that the said letters-patent were contrary to law, and generally inconvenient, in this, to wit, that a certain part of the said alleged invention, the same being an essential and material part of the said alleged invention, and one of the said alleged improvements for which the said letters-patent were granted, and which said improvement was and is described and claimed in the said specification as the *third* particular or improvement, was not, nor is, an improvement in giving signals and sounding alarums in distant places by means of electric currents *transmitted through metallic circuits, and was not, nor is, [*843 of any use, benefit, or advantage, but, on the contrary thereof, was and is altogether useless,—verification.

The fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth pleas were similar to the fourteenth, and were respectively addressed to the improvements respectively described in the specification as the fourth, fifth, sixth, seventh, eighth, and ninth particulars or improvements.

The plaintiffs joined issue on the first, second, third, fourth, fifth, ninth, and eleventh pleas, and traversed the sixth, seventh, eighth, tenth, twelfth, and subsequent pleas; and upon those traverses the defendants joined issue.

The cause was tried before WILDE, C. J., at the sittings at Westminster after Hilary term, 1850.

The specification of Cooke and Wheatstone's patent, dated the 12th of December, 1837, which was put in, was in substance as follows:—

“I, the said W. F. Cooke, for myself and the said C. Wheatstone, do hereby declare that our said invention is described and ascertained in manner following, that is to say, I shall first describe certain apparatus or mechanism, which is constructed according to our said improvements, for giving signals and sounding alarums in distant places by means of electric currents transmitted through metallic circuits, and then, at the conclusion of this our specification, I shall point out the particular improvements whereof the exclusive use is granted by the said letters-patent.

“The description of the apparatus or mechanism will be facilitated by considering it as being composed of the following principal portions, which operate in concert for giving signals or sounding alarums in distant places.

"One of those portions is situated at a convenient place (which may be called a terminus), and adapted for being operated upon by a person who intends giving signals or sounding alarums in distant places.

*844] "Another portion (with duplicates of it, if required) is situated at the distant places where other persons are to receive the intended signals or alarums, and is adapted for exhibiting such signals or sounding such alarums. And, note, there may be, if required, several duplicates of the last-mentioned distant portion, situated one beyond another in different distant places, all which duplicates will operate simultaneously, that is, they will exhibit like signals (or they may sound like alarums) in all the several more and more distant places at the same time, but the place where the most remote of all the said duplicates is situated, may be called the distant terminus.

"And, for communicating between the several portions of the apparatus which are situated as aforesaid at a distance one from another, a number of metallic rods or wires, which are suitably arranged and prepared for conducting electric currents throughout their lengths, are extended from the first-mentioned terminus and portion of the apparatus aforesaid, to reach through all the other aforesaid more and more distant portions thereof, to that portion which is at the distant terminus: the arrangement of the said conducting wires being such that they form as many distinct lines of extension, or courses, capable of conducting electric currents from one terminus to the other, as there are wires: each wire being kept distinct or insulated from all the other wires; also that, in extending from the first-mentioned terminus and portion of the apparatus to the nearest duplicate of the distant portion thereof (if there be any such duplicate), and in thence proceeding onwards to another more distant duplicate, and so on to the most remote of those duplicates which is situated at the distant terminus, each wire must preserve its own continuous course of extension, distinct and insulated from all the other wires, so as to be qualified for transmitting or conducting an electric current throughout its whole length, from the *845] first-mentioned terminus and portion of the apparatus to the most distant portion thereof at the other terminus, without interruption to the continuity of the said current in passing through as many duplicates of that most distant portion as may be established at intermediate places between the two termini. But, note, it is not an essential part of the apparatus that there should be any such duplicates of the distant portion; for, in cases where it is not required to give signals or sound alarums at any intermediate places between the two termini, the first-mentioned portion of the apparatus being situated at one terminus as aforesaid, and the other distant portion thereof being situated at the other terminus, the several conducting wires will extend from one terminus and portion to the other terminus and portion, the several wires being in all cases insulated and kept distinct one from another.

“ And, further, the first-mentioned portion of the apparatus which is situated at one of the termini as aforesaid, should be provided with some such kind of electric apparatus as is usually termed a voltaic battery, and which may be on any construction which is capable of exciting or producing electric currents through metallic circuits: that is to say, if one end of a great length of insulated conducting rod or wire of metal (forming a continuity of metal) is brought into contact with one pole of such a battery, and the other end of the same wire is brought into contact with the other pole of the same battery, so that such rod or wire forms what is termed a metallic circuit, then a continuous electric current will be transmitted throughout all the length of such wire or metallic circuit, in consequence of a continual transmission of electric action, which, as soon as such a circuit is formed, begins to proceed from one pole of the battery, and along or through all the length of the conducting wire, with a very great velocity of transmission, in order to return to the other pole of the same battery, the *electric current thereby performing a circuit from the battery and back [*846 again thereto; and the said electric current, or transmission of electric action in a circuit, will continue without interruption or cessation so long as the metallic circuit is maintained, that is, so long as the aforesaid contacts of the two ends of the conducting wire with the two poles of the battery (and so long as the continuity of metal throughout the whole length of that wire) is continued, provided that the battery is kept in working order: but, note, by continuity of metal in the conducting wire, it is not meant that the whole length of such wire is necessarily made of one unbroken piece of metal, but merely that the ends of every separate piece of metal whereof the whole length is composed, are effectually connected together with suitable contacts for conducting electric currents.

“ And the person who intends giving signals or sounding alarums at a distance, can do so by application and pressure of his hands or fingers upon suitable buttons or finger keys belonging to that first-mentioned portion of the apparatus which is situated at one terminus; the mechanism of those buttons or keys being adapted (according as they may be pressed) for establishing the requisite contacts and connexions between the poles of the voltaic battery and the ends of certain of the said conducting wires, so as to form those particular wires into a metallic circuit for the transmission of an electric current from one pole of the battery, along one or more of the said particular wires, to the distant portion of the apparatus at the other terminus, and thence back again through some other (or some others) of the said particular wires, to return to the other pole of the same voltaic battery, and thereby perform an electric circuit. The manner whereby such an electric current through a metallic circuit, is caused to give signals or sound alarums in distant places, will be hereinafter explained.

*847] "The said electric current which is so transmitted *through those particular wires which are thus formed into a metallic circuit, passes, without interruption to the continuity of the current, in making its progress from the battery, through all the several duplicates of the distant portion of the apparatus, which may, as before explained, be situated at intermediate places between the two termini; or else the said current re-passes, without interruption to the continuity of the current, in making its return towards the battery, through all the said duplicates; but, in either case, the electric current is caused to produce a like and simultaneous effect upon all the several distant portions of the apparatus, that is to say, whatever effect the electric current produces upon the most remote portion of the apparatus which is situated at the distant terminus, it will also produce a like and simultaneous effect upon all the several duplicates of that portion which may be situated at intermediate places between the two termini: and the said transmission of such an electric current will continue so long as the pressure is continued on the aforesaid buttons or finger keys, but no longer; because the metallic circuit is broken and becomes null the instant that the said buttons or keys are released from pressure, and that a cessation thereby takes place in those contacts and connexions which had been for the time established as aforesaid between the two poles of the voltaic battery and certain of the conducting wires, in order to form those particular wires into a metallic circuit for the transmission of an electric current through them as aforesaid.

"And, note, by applying pressure of the hand or fingers upon other suitable buttons or finger keys, amongst divers such with which the said first-mentioned portion of the apparatus is provided, contacts and connexions may be formed between the aforesaid ends of the particular conducting wires before mentioned, and the contrary poles of the said *848] voltaic battery to those *poles thereof with which the same ends were before connected; wherefore, although the same metallic circuit will be formed amongst the several conducting wires as before, nevertheless the transmission of the electric current will take place in a contrary direction through that metallic circuit; and such reversal of the direction of the transmission of the electric current through the same metallic circuit, is caused to produce corresponding differences in the appearance and signification of the signals which are given (in manner hereinafter described) in distant places, by transmission of an electric current through the same metallic circuit.

"And, note, by pressure upon other suitable buttons or finger keys, amongst a diversity thereof, the ends of other of the conducting wires with which the apparatus is provided, may be connected with the poles of the battery, so as to be formed (in like manner as already described) into a metallic circuit, but which will be a different circuit from that already described, because it will be formed by different wires. And

so, according to the number of conducting wires with which the apparatus is provided, several distinct metallic circuits may be formed, and the transmission of an electric current through each of such different metallic circuits as may be so formed (although excited by the same battery) may be caused to give a different signal in distant places; each of which signals is susceptible of two different significations, according as the current is caused to proceed through the particular metallic circuit in one direction or in the contrary direction.

“And, note also, the apparatus or mechanism may be so arranged as that, by pressure upon suitable of the said buttons or finger keys, two (or, in some cases, more) of the said different metallic circuits may be formed out of the several conducting wires at the same time, for the contemporaneous transmission of two or more distinct *electric currents, which may be excited by the same battery; and, although [*849 each of such currents should only give one signal (with one or other of those two significations which belong thereto, according to the direction in which the current acts), nevertheless, the combination or concurrent exhibition of two or more signals, by means of as many distinct electric currents, may have a different signification to that signification which would appertain to the exhibition of either of the signals by itself.

“But, note, two concurrent signals may be exhibited at the same time, without forming two distinct currents as last mentioned, but by the transmission of only one electric current through one metallic circuit; because, as each circuit is composed of two conducting wires united for the time into one circuit, each wire may be considered as one-half of that circuit; and the electric current, in proceeding along one wire or half of the circuit in a direction from the battery towards the distant terminus, may give one signal, and the same current, in returning along the other wire or half of the circuit in a direction towards the battery (in order to complete its circuit) may give another signal; the simultaneous and concurrent exhibition of which two signals may have a different signification from that which would appertain to the exhibition of either of the signals by itself, or to the concurrent exhibition of either of the said signals, with any other signal with which it might be brought into concurrence. But, notwithstanding that two contemporaneous signals may be thus exhibited in concurrence, by transmission of only one electric current through one metallic circuit which is composed of two wires, nevertheless, the two signals which are so brought into concurrence may be differently paired, or their concurrence may be diversified, at the pleasure of the operator; because, if each distinct conducting wire, out of a *number of such, is adapted to produce its appropriate signal by transmission of an electric current through that [*850 particular wire, then, by pressure of suitable buttons or keys as aforesaid, any two of such wires may be conjoined into one metallic circuit, and the electric current which is transmitted through that circuit will

exhibit two concurrent signals, which may (at the pleasure of the operator) be the concurrence of any two of the whole number of individual signals which the several wires are qualified to produce individually.

“ And, by virtue of the several means above described, the apparatus or mechanism may be arranged so as to be qualified to form (at the pleasure of the operator) a variety of different metallic circuits, each such circuit being adapted to give its own appropriate signal: but, nevertheless, the electric current which will be transmitted through each of those circuits can be made to give two different significations to the signal belonging to that circuit, according to the direction of the current. Or, the apparatus or mechanism may be so arranged as to be capable of forming two or more metallic circuits with a distinct electric current through each circuit at the same time, in order to exhibit two (or, in some cases, more) signals in concurrence. Or, the apparatus or mechanism may be so arranged as to be capable of giving two signals in concurrence, by the transmission of an electric current through one metallic circuit; with capability of diversifying the concurrence of the two signals which will be brought into concurrence by the formation of one metallic circuit: and hence, by one or other, or all, of those various means, a sufficient diversity of signals, and change in the significations of those signals, can be given in distant places, for constituting a telegraphic language, or mode of communicating letters of the alphabet, and numeral or symbolic characters.

*851] “ And, furthermore, the manner whereby the aforesaid *transmission of electric currents through metallic circuits is caused to give signals, or to sound alarums, in distant places, is, either by the angular motions which such currents are capable of giving to magnetic needles, which are poised upon centres of motion, and placed in suitable proximity to the said conducting wires through which such currents are transmitted; or else, by the attractive force of occasional magnetism which such currents are capable of exciting in masses of iron which are not magnets themselves, but which are placed in suitable proximity with the said conducting wires through which such currents are transmitted; or else, by the evolution of gas proceeding from water which is decomposed by causing such electrical currents to pass through it; or else, by any two or by all of the said modes of action combined in such manner as is suitable for giving such signals, or sounding such alarums, at a distance, as may be required.

“ And, respecting the adaptation of magnetic needles for giving signals, the same may be made like compass needles, but fixed on axes passing through their centres of motion, and those axes mounted delicately on pivots at their ends, in the manner of the arbors of watch wheels, so as to render the needles capable of moving very freely with angular motion about their centres of motion. Each needle must have some slight tendency given to it to induce it to point in one particular direc-

tion, when it is left to itself, uninfluenced by the electric current: the simplest (and perhaps the best) mode of giving such a tendency, is, by gravitation; in which case, the axis of the needle must be horizontal, or nearly so, and one end of the needle being made rather heavier than the other, that heavy end of the needle will always point downwards when the needle is left to itself: and, whenever the needle does so point upwards and downwards, it denotes that it is quiescent, or at rest, and that *it is not giving any signal. One of the conducting wires [852 before mentioned is disposed vertically, or in a direction parallel to the needle when the same is at rest, the wire being situated as near to the needle as can be to avoid touching: and, when an electric current is transmitted in manner already explained, through the said wire, so as to pass in proximity to the needle, that current will give the needle a slight tendency to move about its centre with an angular motion or deflection from its previous parallelism to the wire. If the transmission of the current through the wire is in one direction, the needle will acquire a slight tendency to deflect one way from the said parallelism; but, if the transmission is in the contrary direction, the tendency will be to deflect the other way.

“But, note, as the tendency to deflection thus given to the needle is but slight, it requires to be multiplied by the same means as is resorted to for a like purpose in the instruments known by the name of galvanometers; that is, by causing the conducting wire to form many convolutions around the needle, or around a narrow space within which the needle is left at liberty to move, but without touching any of the convolutions that the wire makes; the order of the said convolutions of the wire being such as that the wire shall always transmit the electric current in one direction at one side of the plane in which the needle moves, but shall transmit the current in the contrary direction at the other side of that plane. To produce such convolutions of the wire, it must be coiled around the space in which the needle moves, all the ascending parts of the coils being at one side of the needle (that is, towards one end of its axis), and all the descending parts of the coils being at the other side of the needle (or, nearer to the other end of its axis). With this arrangement of the conducting wire, each ascending as well as descending part of the several *coils will transmit the electric [853 current in the proper direction for giving the needle a tendency to deflection one way or other, according to the direction in which the current is transmitted through the coiled wire; and the concurrence of an adequate number of such coils may be made to multiply the before-mentioned slight tendency of the needle to deflection, until it becomes sufficient to turn the needle (notwithstanding the gravitation of its heavy end) with a sudden and decided motion to one side or other of its quiescent or vertical position, the instant that the transmission of an electric current through the wire is commenced, by the formation of two of the

conducting wires into a metallic circuit by pressure on suitable buttons, or finger keys, as already mentioned.

"The extent of deflection, or angular motion, that the needle is permitted to perform, in consequence of the tendency to deflection which it then acquires, is limited by fixed stops: and the instant that, by pressure on the said buttons, a metallic circuit is formed, and an electric current begins to be transmitted through the coils of wire, the needle moves suddenly from its quiescent or vertical position, until it comes to rest in an inclined position against one of its said stops: and it will remain motionless in that inclined position so long as the current is continued; and when the needle is at rest in such an inclined position, it will point to some character, letter, figure, or symbol, which is marked on a suitable dial or tablet; and it is by so causing the needle to point to such character, letter, figure, or symbol, that a signal is given. When the needle is thus made to incline to one side of its quiescent or vertical position as far as its stop will allow, it will point to, and signify, one character, letter, figure, or symbol on the dial or tablet: but, when, by reversing the direction of the electric current through the coiled conducting wire, as already mentioned, the *needle is made to incline to the other side of its quiescent or vertical position, it will point to, and signify, a different character, letter, figure, or symbol on the same dial or tablet.

"And the instant that the electric current through the coiled conducting wire is discontinued, by releasing the buttons or finger keys from pressure, and thereby breaking or nullifying the metallic circuit through which the electric current was transmitted, then the needle returns, by the gravitation of its heavy end, to its quiescent or vertical position, in which it will not point to, or signify, any character, letter, figure, or symbol, on the dial or tablet. And the needle will remain at rest in that quiescent or vertical position, until the transmission of an electric current is resumed, in manner before stated.

"And it will, in most cases, be expedient to affix another second magnetic needle upon the same axis as that needle already mentioned which is included in the space within the coils of the conducting wire as aforesaid, the said second needle being parallel to the former, but so far along the axis thereof as to be beyond, or exterior to, those coils of the wire within which the first described or principal needle is situated: the second needle, which may be called the exterior needle, must be reversed, end to end, in respect to the first described, or principal needle, which may be called the interior needle; that is to say, if the north pole of one needle points directly upwards when they are both in their vertical or quiescent position, the north pole of the other needle must point directly downwards. By this reversal of the poles, the exterior needle will be in proper relative position in respect to those coils of the conducting wire which are nearest to it, so as to be suitably situ-

ated for receiving the deflecting influence of those coils, and therefore the exterior needle will be caused to concur with the interior needle in assuming the required inclining *position. Also, by their reversed poles, the two needles neutralize each other's terrestrial magnetism, or tendency to assume the direction of dipping needles, or of compass needles; the two needles, when thus reversed, forming what is well known by the term of an astatic combination. The exterior needle is that which should point to the characters, letters, figures, or symbols, which are marked on the dial or tablet before mentioned, in preference to the interior needle, which is too much concealed within the coils of the wire to be convenient for that purpose. The axis of the two needles may pass through the plane of the said dial or tablet, and have the exterior needle fixed on at the front of that plane, the coils of conducting wire and the interior needle being behind the same plane. [*855]

“And note, it must be understood in all cases, not only that the several conducting wires with which the apparatus is provided, are effectually insulated one wire from another wire, as before mentioned, but also that the different coils which the same wire is caused to make, as aforesaid, around the space in which the interior needle is included, are also effectually insulated one coil from another adjacent coil, in order that the electric current which is to be transmitted through the conducting wire may be really transmitted from one end of each wire to the other end thereof, without being able to find a shorter course or circuit, by lateral transmission, out of one coil or wire into another adjacent coil or wire. The requisite insulation of the wires may be made in the usual manner of preparing the wire used in the instruments called galvanometers, viz. by surrounding or covering the metal of the wire with coils of thread of silk or cotton, or other suitable substance, and such thread covering may be coated with some suitable resinous varnish which will be impervious to moisture.

“An apparatus or mechanism containing a suitable *number of magnetic needles of the kind above described (astatic or otherwise) for pointing to, or exhibiting upon, a suitable dial or tablet, all the various characters, letters, figures, or symbols, which are intended to be used in giving signals in distant places, is to be provided at that portion of the apparatus which is situated at the distant terminus hereinbefore mentioned; and, if required, duplicates of the same apparatus or mechanism are to be provided at any intermediate places between the two termini, where simultaneous and like signals are required to be given. Also, another such duplicate is to be provided at the hereinbefore first-mentioned terminus, in view of the operator who intends to give signals in the several more and more distant places (the most remote whereof is the distant terminus) by aid of the other several duplicates of the said apparatus or mechanism. [*856]

“The conducting wires must be arranged so that there is one such

wire for each of the astatic or other needles which is contained, as aforesaid, in every duplicate of the apparatus; that one wire first making its convolutions or series of coils around one of the needles in the duplicate which is situated at the first terminus, in view of the operator; thence extending onwards in continuation from the endmost of those coils to the next nearest duplicate apparatus, and there making like convolutions around the corresponding needle thereof; then extending onwards to the next nearest duplicate, and making like coils around its corresponding needle; and so on to that apparatus which is situated at the distant terminus, where the same wire must also make like convolutions around the corresponding needle of that apparatus. In like manner, another such conducting wire, which is insulated from the other wires, is extended in a similar course of coiling round another needle in each of the several duplicates of the apparatus; and so with other wires, in order that every distinct needle in each duplicate may *have its distinct insulated

*857] wire, but that all the corresponding needles in each duplicate may be connected by the same wire. There may also be an additional wire (or wires) extending direct from one terminus to the other, without making any coils, or having any connexion with any needles.

“Now, if one of the before-mentioned wires, which is connected with a set of corresponding needles, is formed (by pressing suitable buttons or finger keys) into a metallic circuit, by conjunction with a wire which has no connexion with any needles, then the electric current which is transmitted through that circuit, will cause simultaneous and like motion in all the said corresponding needles, but in no others. If such current is transmitted in one direction, all those said corresponding needles will incline one way, and will all point to and signify one and the same character, letter, figure, or symbol on their respective dials or tablets. But, if the current is transmitted in a contrary direction, the same needles will incline the other way, so as to point to and signify another character, letter, figure, or symbol on their said dials or tablets. That duplicate of the portion of the apparatus which contains needles, and which, as before mentioned, is placed at the terminus, in view of the operator, enables him to see what signals he is actually giving, when he presses particular buttons or finger keys, and thereby he may avoid making mistakes. The apparatus containing needles at the distant terminus will exhibit like signals, which may be observed by the person who is to receive them, and so will the several duplicates of the apparatus containing needles which may be situated at different intermediate places between the two termini; for, as before mentioned, the needles belonging to every distant portion of the apparatus will exhibit the same signals at the same time.

*858] “It is obvious, that, by releasing the last-mentioned *buttons or finger keys, and pressing others instead thereof, another of the before-mentioned conducting wires, which is connected with another dif-

ferent set of corresponding needles from those last mentioned, may be formed into a metallic circuit with the same (or with another) wire which has no connexion with any needles, and then the same effects as before mentioned will be produced, but upon different needles, and will therefore give different signals. And so on, any other one of those wires which, as before mentioned, is connected with a set of corresponding needles, may, whenever it is required, be formed into a metallic circuit for bringing into operation, and giving signals by, the corresponding needles to which that wire belongs. But so long as only one needle in each duplicate of the apparatus or mechanism containing needles is rendered operative at the same time, so long will the signals thereby given be confined within a series of simple significations, or two significations to each needle, according as it is made to incline and point one way or the other way.

“And, in order to bring two or more needles in each duplicate into concurrent operation at the same time, so as to obtain diversity of significations from their concurrence, two or more distinct metallic circuits may (by pressure upon suitable of the buttons or finger keys) be formed at the same time out of two or more of those wires which have no connexion with needles, together with as many of those wires which belong to sets of corresponding needles; and then the transmission of a distinct electric current through each such circuit, although from the same battery, will actuate two or more needles at once in each of the duplicates of the apparatus containing needles. And it is obvious that any two of the needles contained in each duplicate may be thus brought into concurrent operation, according as the buttons or finger keys are pressed.

*“Or, instead of thus forming two or more distinct metallic circuits for transmission of as many distinct electric currents, [*859 another and more convenient mode of obtaining the same result, of actuating two needles at once, is, to form a metallic circuit by conjunction of any two of those conducting wires before mentioned, whereof each one is connected with its own set of corresponding needles: and then the one electric current which will be transmitted through the metallic circuit so formed, will actuate both such sets of corresponding needles, that is, it will actuate two needles in each of the duplicates of the apparatus containing needles. And, by pressure on suitable of the buttons or finger keys, any two of the said last-mentioned conducting wires may be formed into the one metallic circuit, which, as aforesaid, is to bring two needles into concurrent and cotemporaneous operation; wherefore, any two out of the whole number of needles in each duplicate of the apparatus containing needles, may be so brought into concurrent and cotemporaneous operation, and that is done without making use of any of those other wires before mentioned which have no connexion with any needles; but one of the latter wires *must* be used for forming part of any metallic circuit, whereby it is required to bring only one of the

needles in each duplicate apparatus into operation by the electric current which is transmitted through that circuit.

"And, in cases where it may be required to bring three of the needles in each duplicate of the apparatus into concurrent and coteremporaneous operation, the same may be done by forming two distinct metallic circuits for two distinct electric currents; one of those circuits being formed by conjoining one of the said wires which has no connexion with any needles, to one of the wires belonging to a particular set of needles; the other circuit being at the same time formed by conjunction of two other of the last-mentioned wires belonging to particular sets of needles.

*860] "But, note, three needles in each duplicate apparatus may be brought into concurrent and coteremporaneous operation by one electric current, if the metallic circuit for that current is formed by coupling two of the wires which belong to particular sets of needles with one pole of the battery, and only one such wire with the other pole of the same battery; in which case, one half of the circuit will consist of one wire, but the other half thereof will consist of the said couple of wires; wherefore, the transmission of the electric current through the last-mentioned half of its circuit will be divided between the two wires of the said couple, and, although so divided, it will actuate both the sets of needles belonging to those two wires, at the same time that the corresponding transmission through the first-mentioned half of the circuit will be confined to one wire, and will only actuate the one set of needles belonging thereto; thus making three sets of needles in all which are brought into concurrent and coteremporaneous operation by transmission of only one electric current.

"And, note, it is obvious that four sets of needles may (if required) be brought into concurrent and coteremporaneous operation by transmission of only one electric current, if the metallic circuit for that transmission is formed by coupling two of those wires which belong to particular sets of needles to each pole of the battery; in which case, the transmission of the electric current through both the halves of its circuit will be divided between the two wires of each couple, and, although so divided, it will actuate all the sets of needles belonging to all those four wires which are thus coupled, and whereof the couples are conjoined into one circuit for the transmission of one electric current.

"And, note, in order that the conducting wires may be capable of being conjoined together, any one or two of them, with any other one or *861] two of them, into a metallic circuit, or into metallic circuits, for the formation of a variety of such circuits, as before explained, the said wires must all (or else so many of them as are intended to retain that capability must) be connected together at the most distant terminus by one cross-piece of metal, in a suitable manner, for the free transmission of electric currents from that distant end of any one wire to the corresponding end of the other wires. Wherefore, when the con-

trary ends of any one, two, or more of the same wires (which ends are at the first-mentioned terminus) are to be brought, by pressure on the buttons or finger keys, into connexion with the two poles of the voltaic battery, in any of the various ways of connecting them (which may be necessary for forming the wires which are so connected into such metallic circuits as are required), it will in all cases happen that the said two or more wires which are so formed into a circuit, or into circuits, will be already suitably connected by the said cross-piece of metal at the distant terminus, for the transmission of electric currents through these circuits. And, notwithstanding that the said cross-piece of metal also forms a communication between the distant ends of the wires then for the time belonging to those circuits, and the distant ends of other conducting wires, which do not for the time belong to those circuits, nevertheless, as the last-mentioned wires have no connexion at their other ends with the poles of the battery, the electric current will not be transmitted (or, not in any sensible degree) through those last-mentioned wires, because the current will be confined to the other wires which are actually connected with the poles of the battery, and which therefore constitute the intended metallic circuit or circuits.

“And, furthermore, the apparatus or mechanism hereinbefore set forth, although it has been hitherto described as if it were merely for enabling a person *stationed at the first-mentioned terminus to give signals to other persons situated at the distant terminus, [*862 and also, if required, at such other intermediate places between the two termini as may be provided with duplicates of that portion of the apparatus which is at the distant terminus, nevertheless, with suitable additions to what has been hereinbefore explained respecting that last-mentioned portion, it is equally capable of enabling a person stationed at the distant terminus to give signals to the person stationed at the first-mentioned terminus, and also, if required, to other persons stationed at all the said intermediate places, so as to communicate intelligence in either direction, for carrying on a mutual telegraphic conversation between the persons at the two termini. The said additions are, another voltaic battery and set of buttons or finger keys, with suitable mechanism for them, exactly like those parts already mentioned as being situated at the first-mentioned terminus.

“The said additional battery and set of buttons or finger keys being applied to that portion of the apparatus which is situated at the distant terminus, will enable the person who is stationed there, to connect the distant ends of any of the conducting wires with the poles of the distant battery, so as to form those wires, at the will of that person (according as he chooses to press the buttons or finger keys), into suitable metallic circuits for the transmission of electric currents from one pole of the battery at the distant terminus, along those conducting wires which constitute one half of the circuit, to the other first-mentioned

terminus, and from thence back again, along those other conducting wires which form the other half of the same circuit, to the contrary pole of the same battery; and such transmission is caused to produce all the same signals, and diversity of signals, by means of the different needles, as already explained, the transmission being equally operative *863] upon the needles in *all the several duplicates of the apparatus which contain needles.

“The arrangement of the buttons or finger keys is precisely the same at both termini, and their connexions with the voltaic battery are similar, except that the distant battery has its poles reversed in respect to the poles of the other battery; that is to say, the connexions which are made between each pole of the distant battery and its several buttons or finger keys, correspond exactly to those connexions which are made between the contrary poles of the other battery and its like buttons or finger keys: wherefore, if, by pressing any particular buttons or finger keys, they will cause the needles to give a particular signal or signals at every portion of the apparatus containing needles, it follows, from the similarity of arrangement and reversal of the poles of the distant battery, that, by pressing the corresponding buttons or finger keys at the other terminus, they will cause the needles to give a like signal or signals at every such portion. Wherefore, all that has been hereinbefore explained respecting the mode of giving signals by a person stationed at the first-mentioned terminus, to other persons stationed at the several more and more distant intermediate places, and at the distant terminus, is also to be understood to be equally applicable to the mode of giving signals by a ——— stationed at the distant terminus, to others stationed at the intermediate places and at the first-mentioned terminus. And, note, it is by that duplicate of the portion of the apparatus containing needles, which, as hereinbefore stated, is placed in view of the person stationed at the first-mentioned terminus, that he is enabled to see and receive the signals which the person at the distant terminus intends to give to him.

*864] “And, note, although in general it is intended that *the operator stationed at one terminus shall complete the signals, or series of such, which will constitute a distinct idea or communication from him, before the person at the other terminus begins to return any signals in reply, nevertheless, the apparatus and mechanism will admit, if required, of some signals being made by one party at the same time that other different signals are making by the other party; because some of the conducting wires may be formed into a circuit with the battery at one terminus, whilst others of those wires are formed into a distinct circuit with the battery at the other terminus, and it is obvious that distinct electric currents may be transmitted through those circuits at the same time, without interference of one with the other; and each

of those distinct transmissions will produce its own proper effect upon different needles.

“And, note, there is a cross-piece of metal for connecting the ends of some, or all, of the conducting wires at the first-mentioned terminus, similar to that cross-piece already mentioned as being at the distant terminus, and for a similar purpose as already explained, viz., it is for keeping the wires connected in readiness for forming any of those metallic circuits which they may be required to form with the distant battery: but, when such a cross-bar is provided at both ends of each of the wires, it follows, that, whenever any one of those ends is to be connected with its battery, in order to form one-half of a circuit, the said end must be previously disconnected from its said cross-piece. This disconnexion is most conveniently effected by the same pressure on the button or finger key, which causes the intended connexion of the said end of the wire with its battery to be effected.

“And, before proceeding to state the mode of exciting occasional magnetism, and of decomposing water, *I shall explain the details and drawings of an apparatus and mechanism which is constructed according to the foregoing description. [*865

[The specification then proceeded to explain the mechanism of the apparatus used, referring to the drawings, and concluded as follows:—]

“Having now described our said improvements, I, the said W. F. Cooke, for myself and for the said C. Wheatstone, do hereby declare that the new invention whereof the exclusive use is granted to us by the said letters-patent, consists in the following particulars:—

“Firstly, in the improvement hereinbefore described, for the purpose of communicating determinate angular motions to magnetic needles, by means of electric currents transmitted through metallic circuits, and the adaptation of such angular motions for the purpose of giving signals in distant places. And whereas some experiments have been heretofore made by others, upon giving signals by means of the well-known instruments called galvanometers, which are for measuring the force of electric currents passing through metallic circuits, I wish to be understood that we make no claim to the application of the multiplying coils of conducting wires, hereinbefore described, around the magnetic needles: but the improvement we have made in the adaptation of magnetic needles to the purpose of giving signals, is, in disposing the needles in vertical planes (the axis whereon they are fixed being horizontal), and in making the needles heavier at one end than the other, in order to give them a decided preponderance, or tendency to hang perpendicular, and point upwards, when they are not influenced by electric currents; and in limiting the angular motions of the needles (when they are so influenced) to some certain determinate extent, by providing fixed stops against which the needles may recline, and continue at rest for a time in suitable

*866] *inclining directions for pointing out, on a vertical dial, the significations of the signals they are to give; and, in case two or more such loaded needles are to be placed near together in the same vertical plane, for pointing out signals on the same dial, then in the adaptation of astatic needles, that is, two reversed needles fixed on the same horizontal axis, for giving signals in such cases. But, note, the astatic mode of combining magnetic needles for galvanometers being well known, we make no claim to the use of astatic needles for giving signals, unless such astatic needles are, as before mentioned, disposed two or more in a vertical plane, and are loaded at one end, and have their angular motions limited to a determinate extent by stops.

“Secondly, in the improvement hereinbefore described of combining several magnetic needles, so that they will point out on one dial (suitably marked) the significations of the signals which they are to give, by the determinate angular motions which are communicated to them by electric currents: those signals being given, in some cases, by the inclination and pointing of one needle; in other cases, by the concurrence and mutual pointing of any two needles; or, in some cases, by the concurrence of three or four needles, as may be most suitable for the sort of signals which are intended to be given.

“Thirdly, in the improvement hereinbefore described, of arranging and combining any suitable number of conducting or telegraphic wires into a set capable of being operated upon by buttons or finger keys at each end of the set, and having a voltaic battery, and also a dial, with magnetic needles as aforesaid, at each end of the set; with power of using those parts in such manner that (at the pleasure of the operator) any two or more such wires may have one or other of their ends connected to the two opposite poles of the battery belonging to that end, *867] the contrary ends to those ends which are so connected *being at the same time conjoined together, so as to form the said two or more wires into a metallic circuit or circuits, for the transmission of an electric current or currents throughout the length of two conjoined wires, as a means of giving signals by the angular motions that such current or currents will communicate to magnetic needles which are subjected to the influence of such currents, or of sounding alarums by the conjoined action of magnetic needles aforesaid, or of the evolution of gas from decomposition of water by such currents, and of occasional or temporary magnetism excited in masses of soft iron by such currents. And whereas either end of any wire or wires of such set aforesaid, is capable of being connected with either pole of its appropriate battery, a diversity of metallic circuits can be formed, with a capability of transmitting an electric current in either direction through each such circuit, and of thereby giving a diversity of signals from a few wires.

“Fourthly, in the improvement, hereinbefore described, in the arrangement and combination of each set of the buttons and finger keys,

whereby the ends of all the several conducting wires constituting the set thereof are kept conjoined one to another, in readiness for becoming parts of any such circuits as may be formed by connecting the opposite or distant ends of the wires with the distant battery; but, nevertheless, the several buttons and keys hold all the several ends which belong to them in due order for enabling the operator to disjoin any two or more ends from their fellow ends, by an instantaneous touch, which likewise connects the ends so disjoined, with either pole of the battery belonging to the keys, and, *vice versa*, the same self action of the keys, whereby they disconnect the said ends from those poles when the buttons are released, likewise rejoins those ends to their fellow ends in the set.

"Fifthly, in the improvement hereinbefore described, *whereby [868 a set of combined conducting wires as aforesaid, having a voltaic battery and a set of buttons or finger keys, and also a dial with magnetic needles, for giving signals, as well as an apparatus for sounding alarums at each end of the set, may also have duplicates of such dials, with needles and apparatus for alarums, at intermediate places between the two ends; all such duplicates operating simultaneously with each other, and with the two end dials and alarums, to give like signals and to sound like alarums.

"Sixthly, in the improvement hereinbefore described, and represented at fig. Y, sheet II. of the drawings hereunto annexed, for communicating determinate angular motions to magnetic needles, by subjecting them to the attractive force of occasional or temporary magnetism, which is excited in soft iron by means of electric currents, for the purpose of giving signals in distant places by such determinate angular motions of needles.

"Seventhly, in the improvement, hereinbefore described, and represented at fig. R, sheet II. of the drawings hereunto annexed, for sounding alarums in distant places, either by direct application of the attractive force of occasional or temporary magnetism, which is excited in soft iron by means of electric currents transmitted through metallic circuits, or else by applying the said attractive force of such occasional magnetism to let off ordinary clock-work alarums, and permit them to sound by the mechanical force and action of their own mechanism.

"Eighthly, in the improvement, hereinbefore described, and represented at fig. S, sheet II. of the drawings hereunto annexed, for sounding alarums in distant places, by the aid of an additional voltaic battery (or alarum battery) which is brought into action when required for sounding the alarum; the sounding thereof being either by direct application of the attractive force of occasional *magnetism, or by [869 applying such force to let off clock-work alarums, as above seventhly stated: but, according to this our eighth improvement, the requisite occasional magnetism is excited by an electric current derived from that additional battery; the metallic circuit by which that current

is so derived from the said battery, being formed (when the same is required to act) by an angular motion then communicated to a magnetic needle, which is disposed within multiplying coils of conducting wire, through which an electric current is transmitted from a distance; the said angular motion of the needle being caused to make the requisite contacts for forming the metallic circuit of the additional or alarm battery.

"Ninthly, in the improvement, hereinbefore described, and represented in fig. Q, sheet II. of the drawings hereunto annexed, for effecting the contact requisite for forming a metallic circuit, by which an additional or alarm battery is brought into action, for the purpose of sounding alarms in distant places, as above eighthly set out; but which contact, in this our ninth improvement, is effected by means of the evolution of gas arising from the decomposition of water which is included within a small close vessel, from which the gas cannot easily escape, wherefore it presses down the water, and thereby raises up a small column of mercury from the bottom of the vessel into the open leg of an inverted syphon-tube which is connected with the vessel, so as to raise the mercury up into contact with the end of a wire, in order to form the required circuit."

The witnesses called on the part of the plaintiffs, stated, that, long before the date of the letters-patent granted to Cooke and Wheatstone, it had been familiar to scientific men that the electric fluid generated by means of a galvanic battery might be conducted instantaneously, by means of wires communicating with the two poles of the battery, to a distance; that one Oersted, *a Dane, in the year 1816, discovered that the fluid so conveyed might be made to operate upon a magnetic needle; that, in 1820, a mode was suggested, in a published lecture, by one Ampère, a Frenchman, for making this discovery the means of communicating signals to distant places; that, in 1833, one Ronalds practically applied it to a small extent, by means of frictional electricity; that a German named Schweiger afterwards discovered a mode of accumulating the power of the electric fluid by multiplying coils of wire round the magnetic needle; and that this was in substance the whole that was known of the subject down to the time of the grant of the patent to Cooke and Wheatstone in 1837. The witnesses then explained the operation of the patentees' invention, and stated, that, in their opinion, the mode of carrying out the end proposed was described in the specification with such a degree of certainty and precision as would enable a person even but little acquainted with the subject to carry the invention into effect.

The mode of conveying signals, according to the plaintiffs' patent, was, by causing two or more magnetic needles to deflect or point to letters or figures on a dial-plate, with stops to control the oscillation of the needles,—the person to be communicated with at the distant point

having before him a similar dial-plate with similar magnetic needles; five wires and five needles being used to convey the signals, and a sixth wire for the purpose of completing the circuit, by returning the electric current to the negative pole of the battery whence it started.

The infringement complained of consisted in the working by the defendants of a patent obtained by them on the 11th of February, 1847, for "Improvements in electric telegraphs, and in the arrangements and apparatus to be used therein and therewith, part of which *im- [*871]provements are also applicable to time-keepers and other useful purposes." In their specification, which was enrolled on the 11th of August, 1847, the patentees (the defendants) described their invention to relate, "Firstly, to improvements in the construction and the arrangement of the several parts of, and in the means of applying the electric current to the working of, electric telegraphs, by which visible signals may be indicated and transmitted, or communications conveyed, from one place to a distant place, by the agency of electricity; such visible signals being indicated by the peculiar arrangement and motions of an indicator or indicators, whereby letters and figures, or other conventional signals, may be designated. For this purpose, we cause the electric fluid to pass through a number of coils of fine wire, properly coated or covered with silk or other suitable non-conducting material, which wire is wound round a flat reel or reels of ivory or other suitable material; the end of these fine wires being alternately brought into contact with the galvanic battery, by suitable arrangements whereby the current is made to act on and give motion to a partially magnetized ring or piece of metal suspended and moving on a fine centre in a plane parallel to the side or face of the flat reel about which the wire is coiled, that is to say, parallel to the planes in which the wire is so coiled, the motions of this partially magnetized ring being communicated to an indicator or indicators, whose motions, in connexion with a peculiarly arranged dial-plate, with symbols thereon, may be employed to designate letters, figures, or other conventional signals, and transmit intelligence, by means of electricity. Secondly, our invention relates to the arrangement of apparatus for giving audible signals, by means of electricity, at distant places, which signals are indicated by one or a number of successive blows on a bell or gong. Fifthly, our invention relates to *certain other arrangements and apparatus to be used [*872] in electric telegraphs, for the purpose of enabling the various instruments to be worked independently of each other, or two or more in connexion with each other, but independently of the rest, throughout a long line of telegraphic communication." The specification then described the apparatus, referring to a great number of drawings annexed thereto; and the patentees concluded with the following (amongst other) claims:—"Firstly, we claim as an improvement in electric telegraphs the use of a ring or piece of metal partially magnetized, in

combination with a reel or coil of wire as above described, whereby and wherein the electric current so acts that the motions take place in a direction transverse to the axis of the coil, and parallel, or nearly so, to the planes in which the wire constituting the coil lies: Secondly, we claim as an improvement in electric telegraphs, an indicator or indicators deriving motion respectively from a current of electricity transmitted through a coil arranged and acting on a partially magnetized ring or piece of metal, as above described, and the adaptation of such motions to communicating intelligence between distant places: Thirdly, we claim as an improvement in electric telegraphs, the adaptation of an indicator or indicators to a dial-plate constructed and arranged as above described: Fourthly, we claim as an improvement in electric telegraphs, the working two indicators so as to give the requisite motions, by means of a single handle constructed and arranged as above described: Fifthly, we claim as an improvement in electric telegraphs for giving audible signals, the use of a ring or piece of metal partially magnetized, in combination with a reel or coil, as above described, whereby and wherein the electric current so acts that the motions take place in a direction transverse to the axis of the coil, and parallel, or nearly so, to the planes *873] in which *the wire constituting the coil lies, and actuate suitable apparatus for giving such signals: Eighthly, we claim as an improvement in electric telegraphs, a deflector constructed and arranged as above described, in combination with an earth-plate, to each instrument, whereby the electric current may be diverted, and the instruments insulated, in such manner as to allow the instruments at two or more stations on a line to communicate with each other, independently of the other stations."

The defendants, in working their telegraphs, instead of using a *return-wire*, plunged the two ends of the *conducting-wire* into the earth, which was found to complete the circuit, by returning the electric current to the battery precisely as if the whole circuit had been, as in the plaintiffs' invention, a *metallic* one. By this means, the defendants were enabled to communicate signals by means of *one wire* and *two needles*,—the signs being indicated by repeated deflections of the needles to one side or the other on the dial-plate, according to the direction given to the electric current.

It was proved that the defendants' improvements, as to the number of needles and wires, materially diminished the expense of construction, as well as the liability of the apparatus to derangement from accidental causes.

Although by both methods signals might be communicated to intermediate stations, it appeared that the defendants' method enabled the intermediate stations to *send* as well as to *receive* signals,—which the plaintiffs' method did not.

At the close of the plaintiffs' case, it was submitted, on the part of the

defendants, that the plaintiffs must be nonsuited; for, that an essential part of their invention was, the transmission of the electric current through a metallic circuit, whereas the mode adopted by the defendant was, by transmitting the electric current through a circuit, part of which was metallic, the earth *being made the medium for the completion of the circuit, by returning the electric fluid to the opposite pole of the galvanic battery. [*874

The lord chief justice declined to nonsuit the plaintiffs, but reserved leave to the defendants to move to enter a nonsuit if the court should think the objection a fatal one: and he left six questions to the jury, to which they returned the following answers:—

To the first,—that the making of signals by dials at distant places, was not new.

To the second,—that the handle of the defendants was a different instrument from the cross-bar of the plaintiffs.

To the third,—that the magnetic ring and indicator of the defendants, was a different instrument from the needles claimed in the plaintiffs' specification.

To the fourth,—that the sending of signals to intermediate stations was new to the plaintiffs; that is, was their idea or invention; and that it had been infringed by the defendants.

To the fifth,—that the angular motions of needles, on vertical planes and horizontal axes, in combination with stops, was the invention of the plaintiffs; and that it had been infringed by the defendants.

To the sixth, that, as a whole, the system of counting with one wire and two needles, was not the system of the plaintiffs.

The lord chief justice, upon this finding, directed a verdict to be entered for the plaintiffs, with liberty to the defendants to move to enter a verdict for them if the court should be of opinion that the above answers led to that legal conclusion.

A verdict was accordingly entered for the plaintiffs, damages, 5*l*.

Cockburn, in Easter term last, on the part of the *defendants, obtained a rule nisi to enter a nonsuit, or a verdict for the defendants on the plea of not guilty, or for a new trial. He submitted that the defendants' mode of returning the electric current to the galvanic battery, by using the *earth* to complete the circuit, was essentially different from the mode described in the plaintiffs' specification, which assumed a continuity of *metal* to be necessary throughout; that the defendants' invention in other respects (and particularly as to the number of wires and needles used) materially differed from the plaintiffs'; and that the result of the finding of the jury upon the several questions submitted to them, was, that they supported the patent, but negatived the alleged infringement.

The *Attorney-General* (Sir *John Jervis*) also, on the part of the plaintiffs, obtained a rule nisi for a new trial, on the ground of misdirection,

or that the verdict might (if necessary) be set aside, with reference to certain of the findings, as against evidence. In the result, however, it became unnecessary to discuss this rule.

The *Attorney-General*, *Martin*, *Montagu Smith*, and *Grove*, in Trinity term last, showed cause against the defendants' rule, and

Cockburn, *Webster*, and *Chance*, were heard in support of it.

The arguments are so fully commented upon in the course of the judgment, that it has been thought useless to repeat them.

Cur. adv. vult.

*876] *CRESSWELL, J., now delivered the judgment of the court :

This was an action by the plaintiffs, claiming as assignees of a patent granted in 1837 to W. F. Cooke and C. Wheatstone, for improvements in giving signals and sounding alarms in distant places, by means of electric currents transmitted through metallic circuits.

The declaration recites the letters-patent, and several indentures of assignment whereby the plaintiffs became assignees of the letters-patent, and alleges infringements by the defendants in using and counterfeiting the invention.

The defendants, after setting out on oyer the letters-patent and the indentures of assignment, pleaded certain pleas denying the plaintiffs' title as assignees of the patent, and also the plea of not guilty, and pleas denying that the patentees were the first inventors of the improvements, denying that the invention was new, and denying the utility of some parts of the invention claimed in the specification. Issues were joined on these pleas.

The cause was tried before WILDE, C. J., at the sittings at Westminster, after Hilary term, 1850, when a verdict was found for the plaintiffs, and also certain special matters in answer to questions put to the jury by the lord chief justice, subject to leave to move on the part of the defendant; in pursuance of which, in Easter term, 1850, a rule was obtained calling on the plaintiffs to show cause why a verdict should not be entered for the defendant on the plea of not guilty, or why a nonsuit should not be entered, or a new trial had.

*Cause was shown against that rule in last Trinity term. The argument on that occasion turned upon the question, what was the proper
*877] verdict to be entered in *respect of the special matters found by the jury in answer to the questions of the lord chief justice. Those answers were, as far as it is material to state them, in answer to the third question,—that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification; in answer to the fourth question,—that the sending of signals to intermediate stations, was "new to the plaintiffs," by which expression is to be understood, that it was a new invention of the patentees; in answer to the fifth question,—that the angular motions of the needles in vertical planes on horizontal axes, conjointly with the

stops, were "new to the plaintiffs," meaning, as before, a new invention of the patentees; in answer to the sixth question, that, as a whole, the system of counting with one wire and two needles (which it appeared in evidence was the system used by the defendants) is not the same as the system of the plaintiffs.

In the argument on showing cause, it was insisted for the plaintiffs, that they were entitled to retain the verdict in respect of the answers of the jury to the fourth and fifth questions. The defendants, it was said, were guilty of infringement, within the terms of the declaration, in having used the matters referred to in those answers; those matters having been duly specified, and being fit subjects of a patent, and comprehended within the terms of the patent itself.

Some discussion took place, on the argument, as to whether the defendants had been shown to have used the matters referred to in those fourth and fifth answers; in the result of which it appeared that the defendants had used the sending of signals to intermediate stations, by means of duplicates at those stations of the coils and apparatus used at the terminal stations.

As to the fifth answer, it appeared that the defendants had used an instrument moving in a vertical plane, *which they called a magnetic ring and indicator, producing the same, or very nearly the same result as would be produced by the needle described in the specification. But, as the jury in answer to the third question had found that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification, it was insisted, for the defendants, that the use of the ring and indicator was no infringement of the patent. This objection applied only to so much of the alleged infringement as consisted in using an instrument or portion of machinery moving in a vertical plane, and is of a much less general and important nature than the objections made to the plaintiffs' right to a verdict in respect of either of the two alleged infringements. [*878

The first of these objections, and that which was mainly relied on for the defendants, was, that the patent of the plaintiffs' being described in the title, and also the invention patented being described in the whole of the specification, whenever mentioned, as an invention of improvements in giving signals and sounding alarms in distant places, by means of electric currents transmitted through *metallic circuits*, would protect the improvements of the patentees only when such improvements were applied to metallic circuits; and that no use of such improvements would be an infringement of the patent, if the electric current acting on the improved machinery were not wholly transmitted through a metallic circuit. And, as it no doubt appeared by the evidence that the electric current used by the defendants had been transmitted through a circuit not wholly metallic, but through a circuit which, though metallic in its larger portion, was not continuously metallic throughout, but was made up in a proportion which, though it must be less than the half of the

whole circuit, might be a very large one, by using the earth as the connexion *between two portions of the metal, it was insisted that *879] no infringement had been made by the defendants, or, indeed, could be made, as long as the circuit they used was not metallic throughout, but to a substantial extent non-metallic.

This objection is one of a grave character, and well deserving of consideration; but we are of opinion, that, considering it with reference to the specification, and to the matters which appeared in evidence at the trial, it ought not to prevail.

It appeared in evidence, that at the time of the grant of the letters-patent, the transmission of electric currents through metallic circuits, was known, and that it was also known that the power of the current might be increased by means of coils in the wire by which it was transmitted, so as to deflect a magnetic needle, and thereby give a signal. It also appeared, that, after the grant of the patent, it had been discovered that a large portion of the wire through which the current returned to the battery might be dispensed with, by plunging into the earth the two ends of wire which would have been joined by the part left out. The electric current, it was discovered, would thus pass from one end of the wire to the other, and so complete the circuit, as effectually as if a continuity of wire had been kept up. A circuit on this principle would not be wholly metallic: it would be so in its greater part, and in all that part which contained the coils and operated on the needles by which signals were given.

Now, the patentees, by their specification, do not make any claim to metallic circuits: what they claim is, improvements in giving signals by means of electric currents transmitted through metallic circuits; and the improvements, as appears by the specification, consist entirely in methods and instruments for using the electric current,—assuming it *880] to be transmitted by means open to the *public, and in respect of which the patentees make no claim.

The circuit used by the defendants is metallic in all that part which operates in giving signals, and in all the parts to which the plaintiffs' alleged improvements apply: and it is no condition necessary to the existence of the improvements, that the circuit should be metallic in any other part than that which contains the coils, and operates on the needles: and there is no doubt that the patentees might, without any alteration of the description of their invention as contained in the specification, have removed all colour for this objection, if they had used words, in speaking of the transmission of the current, which could not be contended, as those now used are, to be applicable only to currents through circuits wholly metallic.

The objection in question may be considered as it regards the specification, and as it regards the title of the patent.

With respect to the specification, it is to be observed, that, the claims

of the patentees being for improvements not all immediately connected with, or dependent on, each other, but all applicable to giving signals, &c., by means of electric currents, the plan adopted in the specification, was, to give an account of the whole system or mode of transmission of electric currents for the purpose of giving signals, and the modes of giving those signals, specifying afterwards those parts claimed as improvements, and either expressly disclaiming, or leaving unclaimed, all that was not expressly claimed. It is obvious, that, in such a specification, that part which describes the matter claimed, is to be much more strictly construed than that which, though necessarily mentioned, is not spoken of as a new matter, or as the subject of a grant, but only as something known, and necessary to be referred to for the purpose of explaining *the claim. Considered in this view, we think the specification, in speaking of metallic circuits, may properly be [881 considered as comprehending all circuits which are metallic, as far as it is material to the improvements claimed that they should be so; and that the expression in question is not to be construed with more strictness and precision than is necessary to enable it to fulfil that purpose of explanation for which it was introduced.

With regard to the use of the words "metallic circuits" in the title of the patent, it was urged that the patentees, by using those words, would mislead a person who was in possession of improvements identical with the plaintiffs', but which he intended to use in giving signals by non-metallic circuits, and who might have opposed the grant of a patent of a more comprehensive title, but would acquiesce in one confined to metallic circuits. But it appears to us, that, whatever might be the case, supposing currents transmitted in the manner used by the defendant, to have been known at the time of granting the patent, or of giving notice of the application for it, the title did, in the actual circumstances of the case,—that is to say, the earth circuit not being publicly known,—give sufficient notice to any person secretly acquainted with that discovery, or thinking it probable that some such discovery might be made, and having also invented improvements like those of the patentees, to put him on his guard, and on an inquiry how far the proposed patent might interfere with him. It appears to us reasonable to hold that a claim for a patent for improvements in the mode of doing something by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries not known at the time of the claim, so long as it remains identical *with regard to improvements claimed, and their [882 application.

The second objection was not less extensive than the first, and would allow the full use of all the patentees' improvements, supposing them to be used only in such an apparatus as the defendant used. That ob-

jection was, in substance, that the plaintiffs' patent was for a system of giving signals by means of several wires and converging needles pointing to letters; whereas, the defendant had used *one* wire, and had made signals by counting the deflections of a needle or needles,—which was found by the jury to be a different system from that of the plaintiffs.

This objection appears to us to be founded on a wrong construction of the specification, which, we think, shows the patent not to be for a system of giving signals, but for certain distinct and specified improvements comprehending those now in question,—*the system* being described only for the purpose of explaining the improvements claimed.

Another objection, somewhat connected with that last mentioned, was urged for the defendants,—that the breaches in the declaration, being, that the defendants had used and counterfeited *the invention* of the patentees, was not supported by evidence of the use or counterfeiting of part only. But, on looking at the specification, which explains what the invention is, it appears to consist of nine specified improvements: and the declaration, in speaking of the said invention, is to be considered as if it charged the using, &c., of the said nine improvements, and is sufficiently proved, by showing that one of them has been used.

It appears to us, therefore, that none of the objections which apply to both grounds on which the plaintiffs claim the verdict “in respect of *883] vertical needles, and *of duplicates at intermediate stations,” ought to prevail.

With respect to the objection before adverted to, as to the claim to the verdict regarding vertical needles,—on considering the finding of the jury with regard to the defendants' instrument, in conjunction with the claim in the specification, *antè*, p. 865, and taking, as we are bound to do on the present inquiry, the finding of the jury to be correct, it may be doubtful whether the plaintiffs can claim the verdict on this ground. But, it appears to us that the use of duplicate apparatus at intermediate stations,—which the jury have found to be a new invention, and which was undoubtedly used by the defendant,—entitles the plaintiff to retain his verdict.

There was, indeed, an objection particularly applying to this part of the case, which it is proper to mention: it was insisted that the giving of duplicate signals at intermediate stations, was not the proper subject of a patent; being an idea, or principle, only, and not a new manufacture. But we think that the patentees not only communicated the idea or principle that duplicate signals might be given, but showed how it might be done, *i. e.* by duplicate apparatus at each station; and that this is a fit subject of a patent. It was, indeed, contended that it was obvious and self-evident that a circuit having a distinct coil, could have intermediate ones also, which would operate in the same manner. But it appears to us, that, though it might be probable, *a priori*, that such

would be the case, it was matter of experiment that it could practically be done; and that the invention of the patentees, though simple, was one for which a patent might be granted.

If, as was mentioned on the argument, the defendants have intermediate stations to *send*, as well as to *receive*, communications, it is a very important improvement, for which the inventors may probably be entitled to a patent, *though they may not be entitled to use it, unless by the license of the patentees of the less perfect invention, on which their own is grounded. [*884

For these reasons, we think that the rule must be discharged.

Rule discharged.

CROSSE v. SEAMAN. May 2.

It is no ground for a suggestion under the London small debts act, 10 & 11 Vict. c. lxxi. s. 113, that the debt has been reduced below 20*l.* by a payment into court under a plea of tender.

DEBT, for work and labour and materials, money paid, and money due upon an account stated, the sum sought to be recovered being 26*l.* 5*s.* 6*d.*

The defendant pleaded,—first, never indebted,—secondly, except as to 7*l.* 15*s.*, payment,—thirdly, as to that sum, a tender before action brought.

The plaintiff took the 7*l.* 15*s.* out of court, and, at the trial before MAULE, J., at the first sitting in London in the present term, obtained a verdict for 18*l.* 6*s.* 5*d.*

Brewer, upon an affidavit containing all the necessary allegations, now moved for a rule to show cause why a suggestion should not be entered, to deprive the plaintiff of costs, under the London small debts act, 10 & 11 Vict. c. lxxi. s. 113, relying upon *Turner v. Berry*, 1 L. M. & P. 744, where the debt had been reduced by payment before action brought. [CRESSWELL, J.—Could the plaintiff have sued for the 26*l.* 5*s.* 6*d.* in the county-court?] No. [CRESSWELL, J.—Was he entitled to have 26*l.* 5*s.* 6*d.* at the time of action brought?] Yes; but he was not entitled to bring an action for that sum. This is *different from the case of payment of money into court, where the defendant would [*885 have to pay the costs up to the time of payment; whereas, tender is an absolute bar. [WILLIAMS, J.—A tender is no bar to the action, in debt or assumpsit.] Suppose the whole sum due had been tendered, the plaintiff must have failed in the action. The action, therefore, was not well brought as to the 7*l.* 15*s.*

JERVIS, C. J.—I think there ought to be no rule. Tender and set-

off are not like payment. The plaintiff cannot know that the defendant will set up his tender or his set-off.

The rest of the court concurring,

Rule refused.(a)

(a) See *Heaward v. Hopkins*, 2 Dougl. 448; *Waistell v. Atkinson*, 3 Bing. 289 (E. C. L. R. vol. 11), 11 J. B. Moore, 14 (E. C. L. R. vol. 22); *Downes v. Ray*, 1 Har. & W. 649. But see *Jordan v. Strong*, 5 M. & Selw. 196.

*886]

*BODEN v. FRENCH. May 5.

The declaration stated, that, in consideration that the plaintiff would employ the defendant as a coal-factor to sell certain coals on account of the plaintiff, the defendant promised the plaintiff that he would not sell the said coals *otherwise than for ready money*, and alleged for breach, that the defendant sold the coals otherwise than for ready money, to wit, at two months' credit:— Held, that the action was not sustained by the production of the following letter of instructions given by the plaintiff to the defendant, and by proof of a sale of the coals at 15s. 6d. per ton, at a credit of two months:—"Please sell for me 250 tons of anthracite coal, at such price as will realize me not less than 15s. per ton, *net cash*, less your commission for such sale."

THIS was an action of assumpsit. The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant as a coal-factor, to sell certain coals on account of the plaintiff, for reasonable reward, the defendant promised the plaintiff that he would not sell and dispose of the said goods and chattels otherwise than for ready money, and that he would render to the plaintiff a true account of the sale thereof within a reasonable time; that the plaintiff, confiding in the said promise, did employ the defendant as such factor to sell the said goods, upon the terms aforesaid; and that the defendant accepted such employment; and alleged for breach, that the defendant sold the said coals otherwise than for ready money, to wit, at two months' credit, &c.

Plea, amongst others, non assumpsit.

At the trial, before JERVIS, C. J., at the sittings in London after the last Hilary term, the plaintiff put in the following letter, in order to show the terms upon which the defendant was authorized to sell the coals in question:—

"London, September 26, 1850.

"Mr. French.

"Sir,—Please sell for me two hundred tons of anthracite coal, now lying at Neale's Wharf, Blackfriars, and belonging to me, at such a price as will realize me *not less than 15s. per ton, net cash, less
*887] your commission for such sale. (Signed) "H. BODEN."

It was proved that the defendant had sold one hundred tons of the coal at 15s. 6d. per ton at two months' credit. It appeared also that it was customary in the coal trade to sell coals at a credit of two months, unless sold on the wharf, when the custom was to sell for cash.

The lord chief justice was of opinion that the letter of instructions

did not bear the construction put upon it in the declaration; and accordingly he nonsuited the plaintiff,—reserving leave to the plaintiff to move to enter a verdict for 75*l.*, if the court should be of opinion that the evidence sustained the declaration.

Byles, Serjt., on a former day in this term, obtained a rule nisi.

Bramwell and *Dowdeswell*, on a subsequent day, showed cause.—The defendant's employment must be taken to have been subject to the custom of the particular trade, of which the plaintiff must be assumed to have been cognisant: *Wigglesworth v. Dallison*, 1 Dougl. 201, Smith's Leading Cases, 299. The evidence showed that it was the invariable course of the trade to sell at a credit of sixty days. The direction given here, was, to sell so as to realize,—that is, to insure,—to the plaintiff 15*s.* per ton, less the defendant's commission. [WILLIAMS, J.—Has the defendant sold for *cash*?] He has sold at such a price as will, deducting the discount, realize 15*s. cash*. [JERVIS, C. J.—The letter of instructions will admit of at least three significations: it may mean, sell for cash down 15*s.*, or at such a price as will eventually realize 15*s.*, or a *del credere*.] If it is ambiguous, the nonsuit was right. [CRESSWELL, J.—It may be that the defendant might [*888 sell some of the coals at 16*s.* and some at 14*s.*, so as to make the average 15*s.* Where credit is contemplated, the ordinary expression is, “equal to cash.”]

Byles, Serjt., and *Gray*, in support of the rule.—The defendant was not justified by his instructions in selling otherwise than for ready money. According to Dr. Johnson, “cash” means properly “ready money, money in the chest, or at hand.” In *Eddison v. Collingridge*, 19 Law Journ., N. S., C. P. 268, in assumpsit by the endorsee of a bill of exchange against the drawer, with a plea traversing the drawing, the plaintiff gave in evidence an instrument in the following form:—“Port of London Sea, Fire, and Life Assurance Company. To the Cashier, 10th of September, 1849. 500*l.* Fifty-three days after date, credit Messrs. P. & Co., or order, with the sum of five hundred pounds, claimed per *Cleopatra*, in cash, on account of this corporation. A. C., managing director:” and it was held, that “credit in cash” was equivalent to “pay;” and that the affirmative of the issue was proved. WILDE, C. J., says: “The words ‘credit in cash’ mean, ‘hold at his command,’ or ‘pay to him,’ at the expiration of the specified time, the sum of 500*l.*” [CRESSWELL, J.—“Cash,” no doubt, means “money:” but, the question is, when it is to be realized.] The word “cash,” according to the argument on the other side, has no meaning whatever given to it. The plain and natural construction of the letter is,—“sell for ready money, at 15*s.* per ton.” Thus construed, and thus only, a sensible meaning is given to the whole instrument. [CRESSWELL, J.—Would there have been any breach of duty, if the defendant had sold at a credit of two months, say, *for a bill at two months, and himself discounted [*889

the bill ?] Probably not, so as he realized to the plaintiff 15s. per ton, net cash.

JERVIS, C. J.—I am of opinion that this rule must be discharged. At the trial, it occurred to me that the contract was, to say the least, extremely doubtful, and that the plaintiff had failed to make out that the authority given by the letter, was, to effect sales for ready money only. And the discussion I have heard has not at all tended to relieve me from that doubt. It seems to have been conceded, in the course of the argument, that the letter of instructions is susceptible of more than one probable construction. Now, it must be remembered that it is the plaintiff's duty to make out that the construction which he has put upon it in declaring is the true one: and this he has failed to do, if the matter be at all doubtful. The case is, in this respect, somewhat analogous to a case which I remember at Chester, where the jury said they found the contract produced quite unintelligible; and it was held that the judge was justified in ruling that the plaintiff had failed to sustain his declaration. If, however, it were necessary to put a construction upon this document, I do not think it shows such a contract as that which the declaration assumes. The real meaning, as it seems to me, of the plaintiff's letter of the 26th of September, is,—“Sell for me 250 tons of coal, at such a price as to have available for me at the time of sale 15s. per ton, less your commission.” That construction does not support the declaration. I therefore think the plaintiff was properly nonsuited.

CRESSWELL, J.—I am of the same opinion. The plaintiff, by his declaration, undertakes to construe this very obscure document. He alleges, *890] that the defendant *undertook not to sell the coal otherwise than for ready money, and that he did sell otherwise than for ready money, to wit, at two months' credit. The authority is given in these terms,—“Please sell for me 250 tons of anthracite coal, at such a price as will realize me not less than 15s. per ton, net cash, less your commission.” The defendant, it seems, therefore, is a commission-agent: and we may fairly presume that the contract had reference to some known usage of the coal trade. Now, it is clear, that, by the usage of the trade, a commission-agent may sell without making the purchaser pay to his principal ready money: and, if there was any usage by which the agent pays ready money to his principal, though the sale is on credit, that would seem to be precisely the sort of contract that was contemplated here. That, however, is not the contract upon which the plaintiff has declared. For these reasons, I think the plaintiff has not set out the contract according to its true legal effect, and consequently that this rule must be discharged.

WILLIAMS, J.—I am of the same opinion. The plaintiff has failed to satisfy me that the letter of the 26th of September, 1850, fairly bears the construction necessary to sustain the declaration. I think the defendant would have been guilty of no breach of duty, if, though selling on credit, he had the money forthcoming at the proper time.

TALFOURD, J., concurred.

Rule discharged.

*Ex parte E. W. VIOLETT, a Prisoner. April 26. [891

By an order of adjudication by a commissioner of the insolvent debtors' court, purporting to be made pursuant to the 1 & 2 Vict. c. 110, ss. 76, 78, the prisoner was adjudged to be discharged as to all the debts in his schedule, at the expiration of *six months* from the date of the vesting order, *except as to four debts*, which the commissioner found to have been contracted by means of a breach of trust, and as to which the prisoner was ordered to be discharged at the expiration of *sixteen months* from the date of the vesting order:—Held, that, whether the commissioner had or had not jurisdiction to make the latter part of the order, the first part was no discharge as to the four excepted debts.

THE prisoner, on the 26th of October, 1850, filed his petition in the insolvent debtors court for relief under the 1 & 2 Vict. c. 110; and on the 3d of March, 1851, Mr. Commissioner LAW made the following order of adjudication, under the 76th and 78th sections of that act:—

“Upon hearing the matters of the schedule of the said prisoner, and upon examination made into the same, and upon the said prisoner's swearing to the truth of the same, and executing a warrant of attorney in pursuance of the said acts, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act as to the several debts and sums of money due, or claimed to be due, on the 28th of October, 1850, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf, from the said prisoner to the several persons named in the said schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons gave credit to the said prisoner before the said time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not now known to the said prisoner, who may be endorsees or holders of any negotiable security set forth in the said schedule so sworn to as aforesaid, so soon as the said prisoner shall have been in custody at the suit of one or more of the persons above *men- [892
tioned, for the period of *six months*, to be computed from the said time of making such vesting order as aforesaid; excepting as to a certain debt of 350*l.*, part of the debt of 586*l.* 12*s.* due from the said prisoner to Richard Edols, a certain other debt of 100*l.* due from the said prisoner to George Slade, a certain other debt of 300*l.* due from the said prisoner to John Wilkins, and a certain other debt of 480*l.* due from the said prisoner to Samuel Parsley; and, forasmuch as it appears to the said court that the said prisoner hath contracted the said four last-mentioned debts severally by means of a breach of trust, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act, as to the said several last-mentioned debts, so soon as the said prisoner shall have been in custody at the several suits of the said Richard Edols, George Slade, John Wilkins, and Samuel Parsley, creditors for the same debts re-

spectively, for the period of sixteen calendar months, to be computed from the said time of making such vesting order as aforesaid."

Upon an affidavit setting out the above order, and stating, that the term of six months therein mentioned expired on the 14th instant; that the vesting order bore date the 28th of October, 1850; that, since the said adjudication, and on the 7th of March last, the prisoner was served with a writ of detainer at the suit of Richard Edols; and that he remained in custody of the keeper of the Queen's prison, under and by virtue of such writ of detainer, since the said 14th instant,

Lush now moved for a writ of *habeas corpus* to bring up the prisoner to be discharged.—The order of adjudication is bad so far as relates to the sixteen months' imprisonment. The 75th section of the 1 & 2 Vict. c. 110, empowers the court to adjudge that the prisoner shall be discharged from custody, at such time as the said court *shall direct, *893] as to the several debts and sums of money due or claimed to be due at the time of making such vesting order from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule. The 76th section enacts, "that, in all cases where no cause shall appear to the contrary, it shall be lawful for the said court, &c., according as shall seem fit, to adjudge that such prisoner shall be so discharged, and so entitled as aforesaid, *forthwith*, or so soon as such prisoner shall have been in custody at the suit of one or more of the persons as to whose debts and claims such discharge is so adjudicated, for such period or periods, not exceeding six months in the whole, as the said court, &c., shall direct, to be computed from the making of such vesting order as aforesaid." And the 78th section enacts, "that, in case it shall appear to the court that such petitioner shall have contracted any of his debts fraudulently, or *by means of a breach of trust*, &c., then, "it shall be lawful for such court, &c., to adjudge that such prisoner shall be so discharged, and so entitled as aforesaid, *forthwith*, except as to such debt or debts, sum of sums of money, &c., as above mentioned; and, as to such debt or debts, sum or sums of money, &c., to adjudge that such prisoner shall be so discharged, and so entitled as aforesaid, as soon as he shall have been in custody, at the suit of the person or persons who shall be creditor or creditors for the same respectively, for a period or periods not exceeding two years in the whole, as the said court, &c., shall direct, to be computed as aforesaid." "Provided always," s. 85, * * "that, in all cases where it *894] shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such

prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his or her creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this act had not passed." The commissioner having once adjudicated under the 76th section, his functions were exhausted; and consequently the subsequent adjudication as to the sixteen months' imprisonment, is clearly bad. [CRESSWELL, J.—If this is a bad order, is it a discharge at all?] The legal effect of the order is, to discharge the prisoner, as to *all* his creditors, from the expiration of the six months.

JERVIS, C. J.—It seems to me to be unnecessary to decide whether the commissioner had authority to act upon the 76th and 78th sections together, by adjudicating, as to part, under the former section, and, as to the rest, under the latter, because it is quite clear here, that, as to the four excepted debts, the prisoner is not discharged at all, and consequently as to them the original detainers operated.

CRESSWELL, J.—I am of the same opinion. It is impossible to construe this order of adjudication as a discharge of the prisoner from *all* his debts.

WILLIAMS, J.—I also think it is impossible to construe this order as an order for the discharge of the prisoner, forthwith, as to all the debts inserted in his schedule.

TALFOURD, J., concurred.

Rule refused.

*BESANT *v.* CROSS. *May 9.*

[*895

It is not competent to the acceptor of a bill of exchange to set up a parol contract inconsistent with the contract upon the face of the bill.

In *assumpsit* by endorsee against acceptor of a bill of exchange, the defendant,—being under terms,—pleaded to the further maintenance of the action, that he was indebted to the drawer in a sum less than the amount of the bill; that, before the acceptance, it was agreed between him and the drawer, that he should pay him such lesser sum by four instalments; that he duly paid three of such instalments before, and the fourth after, the commencement of the action; and that the bill was endorsed to the plaintiff without value or consideration:—Held, not an issuable plea.

ASSUMPSIT on a bill of exchange for 98*l.* 19*s.* 6*d.*, drawn by one Thomas upon, and accepted by, the defendant, and payable to the drawer's order four months after date.

The defendant, who was under terms to plead issuably, pleaded, to the further maintenance of the action, as follows:—That, before the time of the making and accepting of the said bill, he, the defendant, was indebted to Thomas in the sum of 65*l.*; that, thereupon, and before the making and accepting of the bill, it was agreed by the defendant and Thomas, that the defendant should pay to Thomas the said sum of 65*l.*, by four instalments of 16*l.* 5*s.* each, to wit, on, &c., &c., and that,

for the purpose of securing the due payment of the said sum of 65*l.* as aforesaid, Thomas should make his bill of exchange, and that the defendant should accept the same; that, in pursuance of the said agreement, Thomas made, and the defendant accepted, the bill of exchange in the declaration mentioned, for the purpose of securing to Thomas the due payment of the said sum of money, and not otherwise, and, save as aforesaid, there never was any value or consideration for the acceptance of the said bill of exchange, or for the payment by the defendant of the amount; that Thomas afterwards endorsed the bill to the plaintiff without value or consideration, in order that the plaintiff might hold it as the agent of Thomas, and that the plaintiff had always held, and still *896] holds, the same *without value or consideration, and as Thomas's agent; that, before the commencement of the suit, the defendant paid to Thomas, and Thomas accepted and received of and from the defendant, the first three instalments, amounting to the sum of 48*l.* 15*s.*, in full satisfaction and discharge of the said three instalments, and that, after the commencement of the suit, to wit, on, &c., being the day agreed upon for the payment of the last instalment, he, the defendant, paid to Thomas, and Thomas then accepted and received of and from the defendant, the said last instalment, in pursuance of the said agreement so due to Thomas; and that it thereupon became and was the duty of Thomas to obtain the bill from the plaintiff, and to return the same to the defendant, and not to allow the suit to proceed; yet that Thomas did not obtain the bill from the plaintiff, but wrongfully suffered the suit to proceed, and that the plaintiff still continued the agent of Thomas,—verification.

The plaintiff, treating the above as a non-issuable plea, signed judgment as for want of a plea, on the 23d of April, and gave the defendant's attorney notice thereof on the 24th, and on the 29th obtained a rule to compute.

Bramwell, on the same day, obtained a rule calling upon the plaintiff to show cause why the judgment, and all subsequent proceedings thereon, should not be set aside, for irregularity.

Lush now showed cause.—The plea is clearly a bad one: it would be bad on general demurrer, or after verdict; for, it sets up a contract by which it is sought by parol to vary the terms of a bill of exchange: *Adams v. Wordley*, 1 M. & W. 374.† [*WILLIAMS, J.*—It was put, on *897] moving, rather as a plea of failure of consideration.] As to 65*l.*, *it does not deny consideration. There is nothing in it upon which the plaintiff can take issue. A plea that is clearly bad on demurrer, is not an issuable plea: *Hughes v. Poole*, 6 M. & G. 271 (E. C. L. R. vol. 46), 6 Scott, N. R. 959.

Bramwell, in support of his rule.—The plea is clearly an issuable plea, though it may be a little informal. The defendant was compelled to put it in its present shape, because the judge at chambers declined to

allow him to plead two pleas, one in bar to the further maintenance of the action, the other in bar generally. [CRISWELL, J.—A plea of payment in pursuance of an agreement, is no answer to an action upon the bill, for the reason assigned by Mr. *Lush*, that it is seeking by parol to vary the terms of the bill.] This is not a plea of payment at all: it is, partial failure of consideration.

JERVIS, C. J.—I am of opinion that this rule should be discharged. Mr. *Bramwell's* argument satisfies me that the plea is clearly non-issuable and bad. He admits that an action lay on the bill. Then, payment after the bill became due, and after the action accrued, would be no answer, unless the agreement suspends the remedy on the bill; and that would be varying the terms of the contract upon the face of the bill by parol, which you cannot do. The plea therefore is clearly no answer to the action.

WILLIAMS, J.—I am of the same opinion. This is in reality an obscure way of pleading that the defendant did not promise that which upon the face of the bill it appeared he did promise.

The rest of the court concurring,

Rule discharged.

That parol evidence is inadmissible to vary the terms or legal import of bills and notes, see *Trustees v. Stetson*, 5 Pick. 506; *Erwin v. Saunders*, 1 Cowen, 249; *Burge v. Dishman*, 5 Blackford, 272; *Boodey v. M'Kenney*, 10 Shepl. 517; *Cole v. Hundley*, 8 Smedes & Marshall,

473; *Smith v. Elder*, 7 Ibid. 507; *Blair v. Williams*, 7 Blackford, 132; *Cockrill v. Kirkpatrick*, 9 Missouri, 697; *Pack v. Thomas*, 13 Smedes & Marshall, 11; *Hancock v. Fairfield*, 30 Maine, 299; *Hill v. Gaw*, 4 Barr, 493.

*BOELEN and Another v. MELLADEW. May 12. [*898

Where a commission issues for the examination of witnesses in a foreign country, the oath of the commissioners may, under special circumstances, be dispensed with.

By the law of Denmark, none but burgomasters have power to administer oaths; and the mode of administering an oath to a witness, is, by causing him to hold up three fingers of his right hand, and declare that he will speak the truth. A commission having failed, for want of the observance of these formalities,—the court, on payment of all costs, allowed a second commission to go, addressed to burgomasters.

A COMMISSION had issued in this case for the examination upon interrogatories of certain witnesses for the defendant, “upon his or her corporal oath, according to the form of his or her religion respectively,” before commissioners at Tonnengen, in the Duchy of Schleswig. By the order, it was provided that the commissioners should, before they proceeded to act under the commission, take an oath in the form therein agreed upon, and that the depositions taken under it should be returned to the consul of the Danish government, in London; the costs of the commission to be costs in the cause.

Upon the return of the interrogatories and examinations, in pursuance of the order, it appeared that neither the commissioners, nor their clerk,

nor their witnesses, had been sworn upon either the old or the new testament, as required by the law of this country; but that each of the witnesses, before giving his evidence, gave his hand to the commissioners and pledged himself to state the truth.

Channell, Serjt., for the defendant, on a former day in this term, moved for a rule calling upon the plaintiffs to show cause why the depositions as returned should not be read in evidence at the trial, notwithstanding that the commissioners and witnesses had not been duly sworn. He referred to *Clay v. Stevenson*, 3 Ad. & E. 807 (E. C. L. *899] R. vol. 30), 5 N. & M. 818, where the Court of Queen's Bench, under special circumstances, dispensed *with the oath usually administered to commissioners. [CRESSWELL, J.—What authority have the judges to receive evidence not upon oath, unless under the special provisions of an act of parliament? Dispensing with the oath of the commissioners, is a very different thing. JERVIS, C. J.—If we were to decide upon motion that the depositions in their present form are evidence, we might be depriving the plaintiffs of an opportunity of tendering a bill of exceptions.] At all events, the court may assist the defendant by granting a new commission, dispensing with the commissioners' oath.

JERVIS, C. J.—The better course will be, to make further inquiry as to the law of the duchy as to the administering of oaths, and let the matter be mentioned again.

Channell, Serjt., afterwards produced an affidavit stating that inquiry had been made of the vice-consul of the duchy, and of other persons, and that the deponent was informed by them, that, by the law of Denmark, the burgomasters are the only persons authorized to administer oaths; that an oath is taken in all judicial proceedings by holding up three fingers of the right hand, to indicate the three persons of the Holy Trinity, and promising to speak the truth; and that persons giving false testimony, after taking an oath in this form, are subject by the law of Denmark to punishment; and, further, that it is contrary to the laws of that country for the commissioners themselves to swear, an oath by them being considered voluntary, and voluntary oaths being strictly forbidden. [WILLIAMS, J.—The law of every country requires some sort of appeal to a Divine power before witnesses are permitted to give their evidence. TALFOURD, J., referred to the case of *Omichund v. Barker*, Willes, 538, 1 Smith's Leading Cases, 195.(a)]

*900] *A rule nisi having been granted, for a new commission to be issued to burgomasters, without requiring them to be sworn.

Byles, Serjt., for the plaintiffs, submitted that the rule could only be made absolute on payment of costs.

Channell, Serjt., was heard in support of the rule.

Per Curiam.—The rule must be absolute upon payment by the de-

fendant of the costs of the rule, and of all costs incurred by reason of the failure of the first commission. Rule absolute accordingly.

HENRY HUNT v. THE GREAT NORTHERN RAILWAY COMPANY. *April 26.*

In a plaint brought in a county court against a railway company, to recover damages for expense and loss of time sustained by the plaintiff in consequence of the improper omission of the company to convey goods on their line, a question was raised as to the right of the company to charge toll for empty wagons:—Held, that the “title to toll” did not thereby come in question, within the meaning of the proviso in the 9 & 10 Vict. c. 95, s. 58.

On the 17th of January, 1851, a summons issued out of and under the seal of the county-court of Hertfordshire, at Barnet, at the suit of Henry Hunt as plaintiff, against The Great Northern Railway Company as defendants, in an action of tort, for loss sustained and expenses incurred by delay in the carriage and delivery of certain coals of the said Henry Hunt from Peterborough to Potter's Bar, and for the wrongful refusal by the company to carry coals upon their railway for him. The particulars of the plaintiff's claim were as follows:—

*“December 21, 1850, to January 10, 1851.	[*901
“Loss of time of three men and two horses at Potter's Bar, waiting the arrival of coal consigned from Peterborough, December 20, 1850	£ s. d. 5 5 0
“Expenses and loss of time of agent to Peterborough twice, occupying three days	3 14 0
“Additional cost of carriage of $37\frac{1}{8}$ tons coals per Eastern Counties Railway	4 6 6
“Cartage of same from Enfield station to Potter's Bar, at 6s. per ton	11 5 0
“Own expenses to London, inquiring respecting these coals, three times, at 10s.	1 10 0
“Loss of sale of ninety tons coals, being at the rate of five tons per day, at 2s.	9 0 0
“Additional cost of $5\frac{1}{8}$ tons coals bought of The Great Northern Railway Company, at 2s.	11 0 0
“Extra cost of thirty-six tons coals, being obliged to deliver sea coals instead of inland, 8s.	14 8 0
	<hr/> £49 19 6” <hr/>

The plaint came on for hearing on the 24th of February, when the plaintiff claimed to recover the several sums above mentioned, as damages for the refusal of the company to carry certain wagons or carriages belonging to the plaintiff, containing coals, from Peterborough to Potter's

Bar; and it appeared from the evidence adduced by him that such refusal was grounded upon a demand made by the company to be paid by the plaintiff a sum of 2l. 10s. for the passing over their line of railway of, and for bringing back, the said wagons empty from Potter's Bar to Peterborough, after having conveyed them from the latter to the former place with coals *therein, and which sum of 2l. 10s. the plaintiff *902] had refused to pay; and it was contended by the plaintiff's counsel that the company's act, 13 & 14 Vict. c. lxi., the 13th section of which imposes a toll of 4½d. per mile on every carriage, did not include empty coal-trucks or wagons.

On the part of the company, it was insisted that the sum so demanded by them in respect of the said wagons was a *toll* or charge authorized by their act; and it was submitted, that, inasmuch as their right to demand the said toll was in question, the judge of the county-court had no jurisdiction to hear and determine the plaint.(a)

The judge took time to consider; and, on the 28th of March, he gave judgment for the plaintiff, debt 39l. 19s. 6d., costs 13l. 8s.

Byles, Serjt., now moved for a prohibition to the judge of the county-court, to restrain him from proceeding upon that judgment.—This is a case in which the company's right to a "toll," within the meaning of the 9 & 10 Vict. c. 95, s. 58, came in question, and consequently the judge of the inferior court acted without jurisdiction. The 13th section of the 13 & 14 Vict. c. lxi., enacts, that, "with respect to the conveyance of goods and minerals, the said companies (b) may lawfully demand and *903] receive as their maximum rate of charge *for the conveyance thereof along their railways, including the tolls for the use of the railways, and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading, and for delivery and collection, and any other service incidental to the business or duty of a carrier, where such services or any of them are or is performed by the said companies: and except a reasonable sum for warehousing and wharfage, or for any other extraordinary services performed by the said companies (in respect of which the said companies may make a reasonable extra charge), any rates or sums not exceeding the rates or sums following," (*inter alia*), "For every carriage, 4½ per mile: For all coal, cannel, culm, coke, slack, and cinders, conveyed any distance not exceeding 24 miles, the sum of 1d. per ton per mile; and, if conveyed for any distance exceeding 24 miles, ¾d. per ton per mile, for the whole distance travelled." And s. 16 enacts

(a) Section 58 of the county-courts act, 9 & 10 Vict. c. 95,—the clause which confers jurisdiction,—contains the following proviso:—"Provided always, that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

(b) The Great Northern Railway Company and The East Lincolnshire Railway Company.

"that the said companies shall from time to time and at all times find and provide sufficient locomotive power, when and as the same shall be required, and (as soon as an adequate and sufficient load shall be in readiness), convey all merchandise, articles, empty wagons, matters, and things, upon and along their railways: provided always, that all minerals shall be presented to the companies in wagons fitted to travel on the railways at the ordinary speed." [WILLIAMS, J.—Why did not the defendants apply for a *certiorari*?] The question for consideration now is, whether the sum claimed by the company under these provisions, is a "toll," within the meaning of the 58th section of the 9 & 10 Vict. c. 95. [CRESSWELL, J.—This is not a *toll*: it is a sum payable for the use of the locomotive power.] In the companies clauses consolidation act, 8 & 9 Vict. c. 20, s. 3, it is provided that "the word 'toll' shall include any rate or charge or other *payment payable under the special act for any passenger, animal, carriage, [*904 goods, merchandise, articles, matters, or things conveyed on the railway." [WILLIAMS, J.—How does the *title* to any toll come in question here?] By the title coming in question, is not meant, whether the party is seised of any hereditament to entitle him to demand the toll; but whether he is entitled to the toll he claims to exact. [WILLIAMS, J.—The question is, not what is the meaning of "toll" in the railway acts, but what is the meaning of that word in the county-courts act.]

JERVIS, C. J.—To entitle the defendants to a prohibition, there must be a *bond fide* dispute as to their title to toll: I think that did not and could not come in question here.

CRESSWELL, J.—The question whether the company have a right to make a charge for returning empty wagons is no doubt a very important one; but it does not raise such a question as is contemplated by the proviso in the 9 & 10 Vict. c. 95, s. 58.

WILLIAMS, J.—The obvious course was to come for a *certiorari*.

Rule refused.

*HUGHES v. CLARK. April 30.

[*905

In debt for rent on an indenture, with a plea of *non est factum*, the plaintiff is entitled to recover on production of a deed bearing a *counterpart* stamp, and on proof of its execution by the defendant,—without going on to prove the execution of a *lease* by himself.

DEBT for rent upon an indenture of lease.

Plea,—*non est factum*.

At the trial, before MAULE, J., at the first sitting at Westminster, in this term, the plaintiff produced a deed, and called one Pinkett, the attesting witness, who proved the execution by the defendant: but upon his cross-examination, the witness said he did not see the plaintiff exe-

cute it, nor was he aware that any deed had been executed by the plaintiff at that or at any other time. The deed produced had two seals affixed to it, and was stamped with the ordinary counterpart stamp.

On the part of the defendant, it was contended, that, in the absence of proof that the deed produced was a duplicate or counterpart, it must be assumed to be a lease, and consequently that the stamp was insufficient.

The learned judge declined to nonsuit the plaintiff, but reserved leave to the defendant to move; and a verdict was found for the plaintiff, damages 425*l*.

Corrie now moved to enter a nonsuit.—He submitted that the indenture in question was under the circumstances inadmissible. [JERVIS, C. J.—Suppose it had appeared that two deeds were executed, and that one only was stamped, would the counterpart (unstamped) have been admissible?] In *Garnons v. Swift*, 1 Taunt. 507, it was held, that, if two parts of an instrument are prepared, but only one is stamped, the party having the custody of the unstamped part may give secondary *906] evidence of the contents of the agreement, if the other party refuse to produce the stamped part. The only case that seems to militate against this argument, is that of *Paul v. Meek*, 2 Y. & J. 116,† where it was held that a lessee, who executes the counterpart of a lease, cannot dispute its admissibility in evidence, or impeach its validity, upon the ground of the original not being properly stamped. ALEXANDER, C. B., there says: “A similar question was decided by Sir W. GRANT, in a case the name of which I do not remember, and which is not reported upon this point. It was a bill for a specific performance, in which the plaintiff stated an agreement, which was admitted by the defendant in his answer. The case came on to be heard at the Bolls, when Sir *Samuel Romilly*, who was of counsel for the plaintiff, produced the agreement, without adverting to the circumstance of its not being stamped. I objected, upon that ground, that the court would make no decree; to which it was answered, that the agreement, being admitted by the answer, might be read from the bill, after reading the admission in the answer: against which I protested, on behalf of the defendant. But Sir W. GRANT said that the statute did not alter the rules of evidence, and that it was competent for the plaintiff to resort to the agreement as stated in the bill, and admitted by the answer; and upon that ground made the decree, although the agreement was not stamped. This seems to me to be a parallel case with the present. By executing the counterpart, the defendants are estopped from objecting to its admissibility, and it was therefore receivable in evidence against them.” [JERVIS, C. J.—The case put by the chief baron is the case of *Slatterie v. Pooley*, 6 M. & W. 664.†] HULLOCK, B., says: *907] “Having executed the counterpart, the defendants were precluded from *objecting to its admissibility, and from impeaching its

validity by producing the original lease. If the defendants could not produce it, it was not necessary for the plaintiffs to do so. That has been decided in several cases. In *Roe d. West v. Davis*, 7 East, 363, which was an action of ejectment upon a clause of re-entry in a lease, on non-payment of rent, against the assignee of the lease, a counterpart was received as sufficient evidence of the holding upon that condition. The case of *Burleigh v. Stibbs*, 5 T. R. 465, is a still stronger decision. In that case, it was held that a counterpart of an indenture, executed by the defendant, in which it was recited that one Rider had put himself apprentice with the defendant, was sufficient evidence against the defendant, that Rider had executed the other part of the indenture, although the declaration proceeded upon the indenture executed by Rider. It seems to me, therefore, that this counterpart was admissible as original evidence, and precluded the defendants from going into proof of the original lease." There, it appeared that a lease had in fact been executed, though, as it was held unnecessary to produce it, the court could not see that it was insufficiently stamped. Here, however, a different question arises: the evidence, as far as it goes, shows that the deed produced was the only one executed between the parties. [CRESSWELL, J.—Why are we to assume that the instrument produced is a lease, when the *tenant* produces it?] It clearly was incumbent on the plaintiff to show affirmatively that the instrument he produced was a duplicate or counterpart, before he could be allowed to avail himself of the lesser duty. [JERVIS, C. J.—The tenant executes an instrument assuming that he is a tenant under a valid deed: is it a violent presumption that he held under a proper deed? CRESSWELL, J.—By pleading *non est factum*, the defendant admits that the plaintiff demised the land to him by deed; he denies that he executed the counterpart.] Suppose it had been *clearly* proved that this was the only deed between the parties, would the court hold this deed with a counterpart stamp to be admissible upon this issue? [CRESSWELL, J.—*Paul v. Meek* seems to show that it would.] *Pitman v. Woodbury*, 3 Exch. 4,† is very much in point. There, the plaintiff declared in covenant on an indenture bearing date the 25th of March, 1838, made between the plaintiff and the defendant (*profert*), whereby the plaintiff then demised to the defendant a certain messuage, with the appurtenances, for the term of seven years, and the defendant did thereby covenant with the plaintiff that he would, yearly and every year during the term, keep the premises in good repair, and give them up in good repair at the end of the term; by virtue of which demise the defendant entered upon and enjoyed the said demised premises. The breach laid, was, for not keeping the premises in repair during the term. The defendant, after setting out the deed on oyer, pleaded, that his part of the indenture was executed by him after the alleged day of the execution thereof; and that the plaintiff's part was never executed by him, or by any agent

of his thereunto lawfully authorized; nor was there ever any demise of the said premises to the defendant, from the said day, for the said term; nor was there ever any lease of any part of the said premises put in writing and signed, or made, signed, sealed, or delivered by the plaintiff, or by any agent of his thereunto lawfully authorized by writing or otherwise; and that, although, before the making of the indenture, to wit, on the 25th of March, 1838, the plaintiff demised the said premises *909] for the term of one year, and so on from year to year, by *virtue of which demise the defendant entered and occupied the premises for a term, to wit, for nine years, which term had ended before the commencement of the suit, the defendant never did occupy the said premises under any demise from the plaintiff other than that last mentioned, or for any term granted by the indenture, and that there never was any consideration for the execution by the defendant, on his part, of the indenture, and that his covenant therein was void. And this was held to be, in substance, a good answer to the action.

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. The defendant has executed an indenture, in which he enters into certain covenants in respect of land which that indenture assumes to have been demised to him by a valid instrument. The lease would be in *his* possession. All that it is necessary to say on the present occasion, is, that there is a presumption arising against the tenant, that there is a deed of which that produced is a counterpart. It is enough to say that the circumstances raise a presumption which dispenses with proof of the actual execution of a lease.

CRESSWELL, J.—I am of the same opinion. The tenant, in consideration of executing a counterpart, gets a lease executed by the lessor. In the absence of evidence that no lease was ever executed, the court must clearly presume that the instrument is what it professes to be, viz., the counterpart of the lease.

The rest of the court concurred.

Rule refused.

*910] *SERRELL v. THE DERBYSHIRE, STAFFORDSHIRE,
AND WORCESTERSHIRE JUNCTION RAILWAY
COMPANY. May 6.

A cause came on for trial before WILDE, C. J., on the 13th of December, 1848, when a verdict was taken for the plaintiff, subject to a special case. Upon the argument of the special case, on the 11th of June, 1850 (which was after WILDE had ceased to be a judge of this court), the court directed a nonsuit. On the 12th of September, the following endorsements were made upon the *nisi prius* record:—

"I certify that this was a fit and proper cause to be tried by a special jury.

"THOMAS WILDE"

"It was assented to at *nisi prius*, that, in the event of judgment being for the defendants, I should certify for the special jury; which, I have accordingly done *nunc pro tunc*.

"TREURO.

The court refused to set aside the certificate as being informal or too late.

EVANS moved to set aside a certificate for a special jury, upon the grounds,—first, that it was granted too late,—secondly, that it was granted by the late chief justice, after he had ceased to be a judge of this court. The affidavit upon which the application was founded, stated, that the cause was tried before WILDE, C. J., at Guildhall, on the 13th of December, 1848, when a verdict was found for the plaintiff, subject to a special case; that such special case was argued before this court on the 11th of June, 1850, when a judgment of nonsuit was directed to be entered; that the defendants proceeded to tax their costs in August, 1850, when, in consequence of their being required to produce the usual certificate of the judge who tried the cause that it was a fit cause to be tried by a special jury, the record was produced before the master, when it was found that there was no such certificate endorsed thereon; that the taxation was thereupon, at the request of the defendants, adjourned by the master; that certificates, of which the following are copies, were afterwards endorsed upon the record:—

*“I certify that this was a fit and proper cause to be tried by a special jury. [911

“THOMAS WILDE.

“It was assented to at nisi prius, that, in the event of judgment being for the defendants, I should certify for the special jury; which I have accordingly done, *nunc pro tunc*.

“TRURO.

“12th September, 1850.”

that the counsel for the defendants, after the verdict was given, applied to the chief justice to certify for a special jury, if it should become necessary, and the chief justice said he would; but that neither the plaintiff nor his counsel on the trial assented, or in any way agreed, to his lordship certifying for a special jury, if it should become necessary, or that his lordship should be at liberty to certify for a special jury *nunc pro tunc*.

It was submitted that the certificate was not given in conformity to the statute 6 G. 4, c. 50, s. 84. (a) [JERVIS, C. J.—I find the inviolable practice of this court to have been, not to require the statute to be strictly complied with: it is a regulation made for the convenience of the court and the bar.] A reasonable latitude may be given: but here the delay was excessive. [CRESSWELL, J.—The time for granting the certificate did not arise until last June. There was no nonsuit until then. *Who was to grant the certificate then?] The statute [912 says, the judge who tried the cause: but here the chief justice’s authority as a judge of this court had been determined by his acceptance

(a) Which enacts “that the person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried, shall, *immediately after the verdict*, certify, under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury.”

of the higher dignity: *Bac. Abr. Courts* (C). [CRESSWELL, J.—It was the *court* who tried the cause, and directed the nonsuit.] Then, the whole thing is informal.

CRESSWELL, J.—The chief justice signs the certificate in his true name at the time of the trial: and he certifies to the bargain made between the parties, by his true title at the time he so certifies. It would be destructive of good faith at the bar to permit such an objection as this to prevail.

The rest of the court concurring,

Rule refused.

PREW v. SQUIRE. May 10.

A judgment on demurrer is not a judgment by default within the meaning of the 13 & 14 Vict. c. 61, s. 11.

Where, therefore, a plaintiff recovered less than 20*l.* upon an assessment of damages upon a writ of inquiry after a judgment on demurrer:—Held, that he was not entitled to costs.

Quære, whether the word “verdict,” in s. 12, is limited to a verdict upon issue joined?

THIS was an action of covenant upon an indenture of lease. The defendant demurred to the declaration. The demurrer came on for argument on the 30th of January last, when the court gave judgment for the plaintiff. Interlocutory judgment was thereupon signed, and a writ of inquiry was executed on the 13th of February, and the damages assessed at one farthing. Final judgment was signed on the 25th of February. On the taxation of costs, it was objected, on the part of *918] the defendant, that the plaintiff was disentitled to costs *by the operation of the 13 & 14 Vict. c. 61, ss. 11, 12, 13, (a) inasmuch

(a) The 11th section enacts, “that, if, in any action commenced after the passing of this act in any of Her Majesty’s superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*,—or if, in any action commenced after the passing of this act in any of Her Majesty’s superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*,—the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and *except in a case of a judgment by default*; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs, by reason of any privilege as attorney or officer of such court or otherwise.”

The 12th section provides, “that, if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, *by verdict*, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record, that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county-court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed.”

And the 13th section provides, “that, if in any such action, whether there be a verdict in such action or not, the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county-court, or that the said cause was removed from a county-court by *certiorari*, then, and in any of such cases, the court in which the said action is brought, or the said judge at chambers, may

as he had recovered less than 20*l.* damages. The master, however, being of opinion that *this was a judgment *by default*, proceeded with the taxation; and final judgment was ultimately signed for [*914 one farthing damages, 20*s.* costs, and 43*l.* 0*s.* 2*d.* increased costs.

The defendant afterwards took out a summons to set aside the final judgment so far as the same related to costs, on the ground that the plaintiff was not entitled to costs. Mr. Justice MAULE, upon the hearing, directed the proceedings to be stayed, to give the defendant an opportunity to apply to the court.

Prentice, on a former day in this term, accordingly obtained a rule nisi to set aside the final judgment so far as the same related to costs, for irregularity, with costs.

Byles, Serjt., and *Wordsworth*, now showed cause.—The 13th section is out of the question; for, it is clear that the plaintiff cannot show that the action was brought for a cause in which concurrent jurisdiction is given to the superior courts, by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in the county-court. The only clauses, therefore, which require consideration, are the 11th and 12th. Now, the 11th section enacts, that, if, in any action commenced after the passing of this act in a superior court, in covenant, debt, detainue, or assumpsit, the plaintiff shall recover a sum not exceeding 20*l.*, he shall have judgment to recover such sum only, and no costs, *except in the case of a judgment by default*. There could be no certificate here under section 12, for, that applies only to a recovery *by verdict*,—which this court, in *Reed v. Shrubsole*, 7 Com. B. 630 (E. C. L. R. vol. 62), 6 D. & L. 707, held, on the 9 & 10th Vict. c. 95, s. 129, to mean by verdict upon an issue joined, and not an assessment of damages upon a writ of inquiry. [JERVIS, C. J.—It is not necessary for us *to decide what is the meaning of the 12th section: you must [*915 rest your case upon the 11th section.] The true question is, what is the meaning of judgment by default. [JERVIS, C. J.—Is a judgment on demurrer a judgment by default?] In *Reed v. Shrubsole*, WILDE, C. J., says(a) that “the section (129) contemplates and provides for only those cases where a trial has taken place, and has resulted in a verdict for the plaintiff for less than the sum required by the act, or in a verdict against him.” [JERVIS, C. J.—The 129th section of the 9 & 10 Vict. c. 95, speaks of the finding of a verdict for a sum.(b) thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed.”

(a) 6 D. & L. 713

(b) “That if any action shall be commenced after the passing of this act in any of Her Majesty’s superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court.”

Do not the jury find for a sum, whether by verdict or on an assessment of damages? I think the statute, by judgment by default, means non-resistance. TALFOURD, J.—You must contend that a defendant who demurs (JERVIS, C. J., at any stage of the proceedings), is guilty of a default. JERVIS, C. J.—In *Taylor v. Rolf*, 5 Q. B. 337 (E. C. L. R. vol. 48), 1 Dav. & Meriv. 229, where a question arose as to the construction of similar words in the 3 & 4 Vict. c. 24, s. 2, Lord DENMAN says: “The words ‘issue or issues tried,’ and ‘default,’ are well known in their ordinary sense, and do not comprehend an inquiry after judgment on demurrer.”] At all events, the form of this rule is incorrect: *916] it should have been, not to set aside the judgment, *but to amend the inquisition. The judgment is perfectly formal; and, if it be erroneous, the defendant ought to be left to his writ of error. [JERVIS, C. J.—The ground of the application, is, that the taxation of costs is improvident. Surely we may set that right. It would be unjust to put the parties to the expense of a writ of error in a manifestly clear case.]

Prentice, contra, was not called upon by the court.

JERVIS, C. J.—I am of opinion that this rule should be made absolute. As to the suggestion just thrown out, I think, that, where the matter is perfectly plain, we ought not to put the parties to the expense of setting a blunder right by the expensive and tedious process of a writ of error. Nor do I think there is anything in the technical objection, that the defect is, in the inquisition, and not in the judgment. However bad the inquisition may be, the defendant does not care for that; all that he complains of, is, the judgment against him for costs. This brings us to the real question, which does not depend upon the meaning of the word “verdict” in the 12th section of the 13 & 14 Vict. c. 61. Where the words of an act of parliament are doubtful or ambiguous, it may be right to consider what construction will operate the least hardship or injustice. But, where the words are in themselves plain, we are bound to construe them according to their common understanding. Here, the language used by the legislature is perfectly plain,—If, in any action commenced after the passing of this act in any of her Majesty’s superior courts of record, in covenant, debt, detinue, or assumpsit, the plaintiff shall recover a sum not exceeding 20*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in *917] the cases hereinafter provided (of which this is not one), and except in the case of a *judgment by default,—which this is not. The only question is as to the meaning of the word “recover.” The 11th section does not speak of recovery *by verdict*, those words are apparently by design left out. This, then, is an action brought in the superior court, in which the plaintiff has recovered one farthing. *Taylor v. Rolf* shows that this is not a recovery by default. When the question properly arises, by a judge certifying under section 12, it will be

soon enough to put a construction upon the word "verdict" in that section. This rule will be absolute with costs.

GRESSWELL, J.—I am entirely of the same opinion. The plaintiff in this case has recovered, in an action of covenant, a sum not exceeding 20*l.*; and the case is not brought within any of the exceptions mentioned in the act. It is unnecessary on the present occasion to consider the meaning of "verdict" in section 12. I shall be quite ready, when the proper time arrives, to reconsider the reasons ascribed to me in the two reports of the case of *Reed v. Shrubsole*, 7 Com. B. 630 (E. C. L. R. vol. 62), 6 D. & L. 707,—one of which,^(a) I must confess, seems to me to be wholly unintelligible.

WILLIAMS, J.—I am of the same opinion. The plaintiff in this case is clearly not entitled to costs, unless the judgment mentioned in the 11th section of the 13 & 14 Vict. c. 61, includes a judgment on demurrer,—which I am of opinion it does not.

TALFOURD, J.—I also am of opinion that a judgment on demurrer is not a judgment by default within the meaning of the 11th section.

Rule absolute, with costs.

(a) 7 Com. B. 630 (E. C. L. R. vol. 62).

***DIXON v. ROPER. May 12.**

[*918

Issue was joined in 1844; the court in 1851 discharged, with costs, a rule for judgment as in case of a nonsuit.

ISSUE was joined in this cause on the 3d of January, 1844, and notice of trial given for the sittings in Hilary term in that year, and again for the sittings in the following Easter term, but both countermanded. Upon an affidavit of these facts,

Thompson, on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit.

Hake now showed cause, upon an affidavit stating that the plaintiff had abstained from proceeding to trial, on account of the insolvent circumstances of the defendant, and a further affidavit which stated, that, about six years ago, the deponent was present at the police-court, Bow Street, when the defendant was committed for trial on a charge of shoplifting, and that she was subsequently tried at the Old Bailey, and, as the deponent was informed, and believed, convicted, and sentenced to two years' imprisonment.

Thompson objected that the affidavit was too loose and unsatisfactory to be received as proof of so serious a charge.

JERVIS, C. J.—Apart from the charge of shoplifting, there is quite enough to induce the court to discharge this rule with costs. Having allowed the cause to sleep for seven years, the defendant had no just

ground to apprehend that it would now be proceeded with. There is no pretence even for a *stet processus*.

The rest of the court concurring, Rule discharged, with costs.

*919]

*WHITE v. GARDEN. May 1.

A contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor; and it is too late to declare such election after the goods have passed into the hands of a *bond fide* purchaser.

TROVER for iron. Pleas,—first, not guilty,—secondly, not possessed.

At the trial, before JERVIS, C. J., at the sittings in London, after the last term, the evidence disclosed the following facts:—

One Parker, in August, 1850, bought of the defendants seventy tons of iron, paying for it 83*l.* in cash, and giving a bill for the residue, 113*l.* 14*s.*, purporting to be accepted by one Thomas, a seedsman at Rochester. Parker afterwards sold the iron to the plaintiff, to whom it was, by Parker's order, delivered by the defendants.

On the 1st of October, Parker made a further purchase of fifty tons of iron from the defendants, for which he gave them a bill also purporting to be accepted by Thomas. This second parcel of iron was likewise sold by Parker to the plaintiff, and was forwarded to the plaintiff's wharf on the 4th of October, by one Riddell, the defendants' lighter-man, pursuant to a delivery order signed by Parker on the 3d. The barge containing the fifty tons was left, with the delivery order by Riddell, alongside the plaintiff's wharf to be unloaded. Subsequently, the defendants, having discovered that the supposed acceptor of the bills was a fictitious person, and that they had been defrauded, sent Riddell to the plaintiff's wharf to get back the iron. Riddell accordingly took away the lighter, with twenty-nine tons of the iron which remained therein: and the defendants gave the plaintiff notice of the fraud, and desired him not to part with any of the iron in his possession purchased of Parker.

*920] *The purchases were *bond fide* on the part of the plaintiff, and had been made at the fair market price, and through the intervention of a broker.

It appeared that Parker had given the defendants a false address: but it did not appear that the defendants had made any inquiry either about him or the acceptor of the bills, until after the iron had been sent by them to the plaintiff's wharf.

On the part of the defendants, it was insisted, that, the transaction being a fraud on the part of Parker, no property in the iron passed to

him, and consequently none could be acquired by his vendee, though no party to the fraud.

For the plaintiff, it was submitted, that the right in the original vendors to rescind the sale, was at an end when the goods had come to the hands of a *bond fide* purchaser for value.

The lord chief justice left four questions to the jury, first, whether the plaintiff had purchased the iron from Parker, *bond fide*,—secondly, whether there had been a delivery of the iron by the defendants to the plaintiff,—thirdly, whether Parker had obtained the iron *animo furandi*,—fourthly, whether he had obtained it by fraud. The jury answered the first two questions in the affirmative, and the third in the negative: but, as to the fourth, they said they could not agree in finding fraud, though they were all of opinion that Parker never intended to pay for the iron.

His lordship thereupon directed a verdict to be entered for the plaintiff, for 75*l.*, the value of the twenty-nine tons of iron removed from alongside the plaintiff's wharf,—leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that no property in the iron passed by the sale from Parker to the plaintiff.

**Humfrey*, on a former day in this term, obtained a rule nisi accordingly.—He submitted, that, under the circumstances, no property passed to the plaintiff by the pretended sale; citing *The Earl of Bristol v. Wilsmore*, 1 B. & C. 514 (E. C. L. R. vol. 8), 2 D. & R. 755 (E. C. L. R. vol. 16), and *Load v. Green*, 15 M. & W. 216.†

Byles, Serjt., and *Hugh Hill*, now showed cause.—Where goods are obtained by fraud, the sale, no doubt, is in one sense void, that is, it is void at the election of the vendor; but such election must be made before the rights of an innocent vendee have intervened. "A thing may be void or not void, at the election of him whom it concerns:" per Lord HOBART, C. J., in *Winchcombe v. The Bishop of Winchester*, Hob. 166. Goods fraudulently obtained by A. from B., and coming to the hands of C. by gift, may be recovered back; but it is otherwise where C. has acquired them by a *bond fide* purchase. [JERVIS, C. J., referred to *Davis v. Morrison*, Lofft, 185. There, one Deeds bought plate of the defendant, and gave him a draft on a banker. The defendant Morrison gave a receipt on this draft as for cash. Deeds pawned the plate to the plaintiff, a pawnbroker, showing him the receipt given by the defendant, as evidence of his property; on which Davis took the goods in pawn. The draft was a bad one; for Deeds had no money with the banker on whom he drew. Deeds was tried on an indictment on the 30 G. 2, c. 24, preferred by Morrison, for procuring goods under false pretences. Davis produced the goods on the trial, to convict Deeds. Morrison seized and kept the goods. Davis on this brought an action of trover: and, after argument on a special verdict, he was held entitled to recover.

*922] WILLIAMS, J.—It seems not to have occurred to any one “where, that the question turned upon anything but the statute 1 Jac. 1, c. 21.] *Parker v. Patrick*, 5 T. R. 175, is a similar case: it was there held, that, if goods be obtained from A. by fraud, and pawned to B. without notice, and A. prosecute the offender to conviction, and get possession of his goods, B. may maintain trover for them. The court there say: “This is distinguishable from the case of felony; for, there, by a positive statute,(a) the owner, in case he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained from the defendant by a fraud.” PARKER, B., speaking of that case, in *Load v. Green*, says (b) “The case of *Parker v. Patrick* has been doubted; but I think it may be supported on the ground that the transaction is not absolutely void, except at the option of the seller: he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and resold the goods to a third party. *Wright v. Lawes*, 4 Esp. N. P. C. 82, is another authority to the same effect.” *Sheppard v. Shoolbred*, Carr. & Marsh. 61 (E. C. L. R. vol. 41), shows the strong inclination of Lord ABINGER’S opinion, upon this subject. “Although,” he says, “a fraudulent vendee may be sued in trover, I do not agree that every other person may be made subject to such an action, into whose hands the goods may have passed. The case proposed by the plaintiffs, is, that where the goods are fraudulently obtained, and sold, no property passes to the vendee; and such is undoubtedly the fact: but Sir T. Plumer’s case (c) shows, that, where the original owner consents to the transfer, that effect does not follow. If *923] the goods in this case were obtained by fraud, yet, if the *defendants were not privy to that fraud, I am of opinion that they are not liable in this action.” *White v. Spettigue*, 13 M. & W. 603,† was a case of felony: the books had been sold to the defendant, before the owner knew that they were gone. Here, the defendants intended to part with the goods; and they obtained negotiable paper for it. Where one of two innocent persons must suffer, it is but right that the loss should fall upon him who ought to have made the inquiry, and who omitted to do so.

Humfrey and Willes, in support of the rule.—Where goods have been obtained by fraud, no property passes, unless the seller has done some act to signify his election to treat the transaction as a valid sale. *Parker v. Patrick* is expressly overruled by *The Earl of Bristol v. Wilsmore*, 1 B. & C. 514 (E. C. L. R. vol. 8), 2 D. & R. 755 (E. C. L. R. vol. 16), and *Peer v. Humphrey*, 2 Ad. & E. 495 (E. C. L. R. vol. 29), 4 N. & M. 430. In the former case, ABBOTT, C. J., says,—“If Miller contracted for and obtained possession of the sheep in question with a preconceived design of

(a) 21 H. 8, c. 11. See *Horwood v. Smith*, 2 T. R. 750.

(b) 15 M. & W. 219.†

(c) *Taylor v. Sir T. Plumer*, 3 M. & Selw. 562.

not paying for them, that would be such a fraud as would vitiate the sale, and according to the cases which have been cited, (a) *would prevent the property from passing to him.*" [WILLIAMS, J.—My brother Byles does not dispute that proposition,—as between the original parties.] In *Peer v. Humphrey*, property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased *bond fide*, but not in market overt: the plaintiff gave notice of the felony to the defendant, who afterwards sold the property in market overt; after which, the plaintiff prosecuted the felon to conviction: *and it was held that the plaintiff might recover from the defendant the value of the property, in trover. Lord DENMAN there says: "It is quite clear that no property ever passed to the defendant, or from the plaintiff. One difficulty, indeed, arises from Lord KENYON's expression in *Horwood v. Smith*, 2 T. R. 755, that 'the property remains *in dubio*.' I think that either the expression was a hasty one, or it has been reported by mistake. A sale in market overt clearly gives a *prima facie* title to the purchaser. Another difficulty arises from the case of *Parker v. Patrick*. There, indeed, the court distinguished between fraud and felony: but, in the argument for the present defendant, it is denied that such distinction can be taken; if so, the decision in that case was incorrect. And if the question of goods fraudulently obtained were before us, I cannot help thinking that the case of *Patrick v. Parker* would not bear examination. The *Earl of Bristol v. Wilsmore* seems to me to be quite inconsistent with it." [WILLIAMS, J.—In *Peer v. Humphrey*, the defendant bought the oxen of the thief. CRESSWELL, J.—The distinction between fraud and felony is this,—in the one case, the man who parts with the property makes a contract *in fact*; in the other he does nothing.] In *Noble v. Adams*, 7 Taunt. 59 (E. C. L. R. vol. 2), 2 Marsh. 366 (E. C. L. R. vol. 4), it was expressly held, that the obtaining of goods upon false pretences, under colour of purchasing them, does not change the property. [CRESSWELL, J.—There the action was brought by the man who had perpetrated the fraud: the report is by no means satisfactory.] If a sale from A. to B. passes no property, how can a sale by B. pass property to C.? [CRESSWELL, J.—Is it possible that the property in goods can pass by a sale which has been fraudulently obtained?] Under certain circumstances, undoubtedly, it may: the vendor may choose to affirm *the sale; but, unless he does some act to *affirm* the sale, [*925 it is void. There is a semblance of a contract here; but there is not the assent of both minds to the same thing. [CRESSWELL, J.—If your argument is correct, the original vendors might maintain trover for the iron, even though it had passed through the hands of a dozen successive purchasers.] There can be no objection to that. [CRESSWELL, J.

(a) *Rex v. Lara*, 6 T. R. 565; *Rex v. Jackson*, 3 Campb. 370; *Rex v. Freeth*, 2 Russell on Crimes, 1392; *Noble v. Adams*, 7 Taunt. 58 (E. C. L. R. vol. 2), 2 Marsh. 366 (E. C. L. R. vol. 4); *Read v. Hutchinson*, 3 Campb. 352.

—Lord KENYON thought otherwise in *Horwood v. Smith*.] In *Campbell v. Fleming*, 1 Ad. & E. 40 (E. C. L. R. vol. 28), PATTESON, J., says: “No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud, may be resisted.”

CRESSWELL, J.—I am of opinion that this rule must be discharged. It appears that the plaintiff made a contract with Parker for the purchase of fifty tons of iron. It may be very doubtful whether Parker had the iron at the time. But afterwards (or before, as the case may be) he purchased fifty tons of iron from the defendants, giving them in payment a bill purporting to be accepted by a supposed seedsman at Rochester. It turned out that that was a fictitious bill; no such person as that described as the acceptor being to be found at Rochester. The transaction on the part of Parker was altogether fraudulent. Having thus by fraud induced the defendants to trust him, Parker sells the iron to the plaintiff, and gives him a delivery order, which is acted upon by the defendants, who send the iron to the plaintiff's wharf by their own lighterman. Having received the iron alongside his wharf, the plaintiff pays Parker for it; and the defendants afterwards, having in the interim discovered that they had been defrauded, seize the iron. The question *926] is, whether the plaintiff, *who it is admitted acted *bona fide*, by this purchase obtained a property in the iron. It seems to me that the case of *Parker v. Patrick*, as explained in *Load v. Green*, well warrants us in discharging this rule. PARKE, B., there says that that case may be supported on the ground that the transaction is not absolutely void, except at the option of the seller; that he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and re-sold the goods to a third party; and that *Wright v. Lawes* is an authority to the same effect. I think it is. And I see no difficulty or hardship in so deciding. One of two innocent parties must suffer: and surely it is more just that the burthen should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves. Though Parker could not have enforced the contract, I see no reason why the plaintiff should not.

WILLIAMS, J.—I am of the same opinion. I think the observations of PARKE, B., in *Load v. Green*, are founded on good law, and suffice to enable us to decide this case; not that I think *Parker v. Patrick* can be so explained. I venture to think that the court were wrong in *Parker v. Patrick*, not because they take a distinction between felony and fraud, but because they assume, that, even if it had been a case of felony, the plaintiff must have relied upon the statute 21 H. 8, c. 11, to sustain his action. In that I think the court took an erroneous view of the law.

The case may, nevertheless, be supported in the way put by my brother PARKE. As between these parties, I am clearly of opinion that the property in the iron in question passed by the sale from *the defendants to Parker, and by Parker to the plaintiff. The general [*927 rule of the law of England undoubtedly is, as is said by ABBOTT, C. J., in *Dyer v. Pearson*, 3 B. & C. 38 (E. C. L. R. vol. 10), "that a man who has no authority to sell, cannot, by making a sale, transfer the property to another." But to that rule there are many exceptions; and this is one of them.

TALFOURD, J.—I also am of opinion, as well upon principle as upon authority, that this rule should be discharged. There is a very obvious distinction between the cases of goods obtained by felony and fraud or false pretences: in the one case, the owner of the goods has no intention to part with his property; in the other, he has. A contract for the sale of goods, though obtained by fraud, is perfectly good, if the party defrauded thinks fit to ratify it. It appears to me that the defendants here intentionally parted with their property in the iron when they caused it to be delivered to the plaintiff; and it is not competent to them, after a third party has by their act been induced to part with his money, to turn round and say that the contract as between them and Parker was null and void, and that Parker had no property, and therefore could pass none to the plaintiff. It appears to me that the doctrine of PARKE, B., in *Load v. Green* is well warranted by the authorities.

JERVIS, C. J.—At the trial, I acted upon the opinion thrown out by my brother PARKE, in *Load v. Green*; and I am glad to find that the rest of the court agree with me in thinking that that opinion is reconcilable with the authorities. The question is one of considerable importance, as affecting the mercantile transactions of this country: for, if the argument urged on the part *of the defendants were well [*928 founded, goods at all tainted by fraud might be followed through any number of *bond fide* purchasers,—a most inconvenient, and, as it strikes me, a most absurd doctrine. A vendor, who does not choose to avail himself of means of inquiry, would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world. It appears to me that the cases of *Davis v. Morrison* and *Parker v. Patrick* are well supported on the ground suggested by my brother PARKE. All the cases relied upon by the defendants are cases where the transaction has been questioned as between the immediate parties. The principle relied on by PARKE, B., in *Load v. Green* was again affirmed,—though, perhaps, a little too extensively,—by Lord ABINGER, in *Sheppard v. Shoolbred*.
Rule discharged.

Where a sale of goods is procured by fraud in the vendee, the sale is not void, but voidable by the vendor; and, until it is so avoided, the vendee may give a perfect title to a *bond fide* purchaser without notice of the fraud. *Rowley v. Bigelow*, 13 Wendell, 570; *Williams v. Given*,

6 Grattan, 263; *Thompson v. Lee*, 3 Watts & Serg. 479. Where goods are obtained fraudulently, but not feloniously, a purchaser from the fraudulent holder cannot defeat the claim of the original owner, unless he purchased in good faith and without notice of the fraud; and where he parted with no new consideration, and the purchase was out of the usual course, at a sum less than the value of the goods, under circum-

stances of great suspicion, such as altered and defaced marks upon the boxes, &c., it was held that he was not a *bond fide* purchaser. *Robinson v. Dauchy*, 3 Barbour's Sup. Ct. Rep. 20. A party who has been induced by fraud to sell land, may recover it back from a *bond fide* purchaser of his grantee, if such purchaser has not paid the purchase-money. *Jackson v. Summerville*, 13 Penn. State Rep. 359.

END OF EASTER TERM.

MEMORANDA.

In Hilary Vacation, 1851, the Right Hon. Lord LANGDALE retired from the office of Master of the Rolls, and was succeeded by Sir *John Romilly*, Her Majesty's Attorney-General.

Sir *Alexander James Edmund Cockburn*, Knt., Her Majesty's Solicitor-General, was promoted to the office of Attorney-General.

William Page Wood, Esq., one of Her Majesty's Counsel, was appointed Her Majesty's Solicitor-General, and thereupon received the honour of Knighthood.

In Easter Term last, *George James Turner*, Esq., one of Her Majesty's Counsel, was appointed to the office of Vice-Chancellor, vacant by the resignation of Sir JAMES WIGRAM.

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At the trial proof was given, that the defendant had ordered 2000 aerometers, that 300 had been delivered and paid for, and that the plaintiff had prepared materials for making the rest, but that the defendant had discharged him from so doing.

The variance being objected to at the trial, the lord chief justice allowed the plaintiff to amend his declaration, by stating the contract in conformity with the proof, unless the defendant's attorney would produce an affidavit that the defendant would be prejudiced in his defence by such amendment:—Held, that the amendment was warranted by the 3 & 4 Will. 4, c. 42, s. 23. *Jones v. Hutchinson*, 515

2. Where the opposite party waives his right to have an amendment formerly made at the time, it is enough that it is made within a reasonable time,—within the time allowed for moving,—provided the amendment, when made, is in accordance with the judge's note. *Ib.*
3. An affidavit of the defendant's attorney stated, that he was taken entirely by surprise by reason of the amendment being permitted to fit the evidence given of an order for 2000 aerometers; and that, had the declaration originally been framed as amended, he would have been able to show that such an order could not, from the nature of the article, have been given:—Held, not an "affidavit of surprise," or sufficient to show that the defendant could have been prejudiced in his defence by the amendment. *Ib.*
4. The court will not review the judge's decision as to allowing or withholding an amendment; nor will they grant a new trial, on the ground that the counsel's discretion as to assenting to an amendment offered by the judge, is fettered by a strong expression of opinion on his part. *Lucas v. Beale*, 739
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his own proper goods, and that the defendant accordingly bought the goods as the goods of A.; and that A. was indebted to the defendant in a large amount.

At the trial, it was proved that A. and B. were authorized by the plaintiffs to carry on the trade and sell the goods as and for the goods of "A. & Co."

The judge refused to allow the plea to be amended, under the 3 & 4 W. 4, c. 42, s. 23, by inserting therein the name of B., or by alleging that the goods were sold by A. & B.: but he directed the jury to find the facts specially, under s. 24.

The jury found "that A. was authorized to sell the goods as the goods of 'A. & Co.,' but not as the goods of A.; and that 'A. & Co.' represented A. & B.":—

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ARBITRAMENT.

I. Authority of Arbitrator.

1. The declaration stated that a certain difference had arisen and was depending between A. and B. touching certain railway shares which A. at the request of B. had purchased for B., and for which A. had paid 122*l.*; that, for putting an end to the said difference, A. and B. submitted themselves to the award of C. to be made between them of and concerning the said difference; that B. promised to perform the award; that C. made his award of and concerning the said difference, and did thereby award that he decided in favour of A., and that 50*l.*, which had been deposited by A. with B., was in part payment of the said twenty shares, and A. by his award did then request B. to pay the balance of the account forthwith; and that B. refused to pay A. the balance of the said account, amounting to 72*l.*, according to the tenor and effect of the award:—

Held, that the arbitrator's authority to make the award sufficiently appeared, although the nature of the difference was not specifically stated; and that the "request" to pay amounted to a direction. *Smith v. Hartley*, 800

2. But, *semble*, that the direction to pay "the

balance of the account," would have been objectionable, if pointed out as cause of special demurrer. *Smith v. Hartley*, 800

II. Construction of Award.

- Finality*.]—1. A cause and all matters in difference were referred to an arbitrator, who awarded as follows:—"Having heard and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before me in pursuance of the said reference, I do make and publish this my award in writing of and concerning the several premises so referred as aforesaid:" he then disposed of the several issues, and directed that the defendants should pay a certain sum to the plaintiff, and that upon payment of that sum, the plaintiff should execute and deliver to the defendant a general release:—Held, that the award was sufficiently final, and disposed of all the matters in difference referred. *Creswick v. Harrison*, 441
2. The Court, however, refused to make an order on the defendant to pay the sum awarded, pursuant to the 1 & 2 Vict. c. 110, s. 18,—the case not being one in which they would have granted an attachment. *Id.*

III. Time for Taxation of Costs on Award.

- A cause and all matters in difference between the parties were referred by an order of nisi prius, by which a verdict was taken for the plaintiff, subject to an award,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator by his award ordered that the verdict entered for the plaintiff should stand, and directed that the defendant should pay to the plaintiff the costs of the reference and award:—Held, that the plaintiff was not entitled to have an *allocatur* for the costs, or to sign judgment, until the expiration of the proper time for moving to set aside the award. *Jones v. Ives*, 429

ARGUMENTATIVE TRAVERSE.

See PLEADING, VI.

ARRANGEMENT.

Deed of—See BANKRUPT, III.

ASSESSMENT OF DAMAGES.

See COUNTY COURT, V. 3.

ATTACHMENT.

For Non-Performance of an Award,—
See ARBITRAMENT, II. 2.

ATTORNEY.

Lien for Costs—See COSTS, II.

AUCTIONEER.

I. Authority of.

An auctioneer who is employed to sell goods by public auction, has not such an interest as will make the license to enter the premises for that purpose irrevocable. *Taplin v. Florence*, 744

II. Goods in hands of, privileged from Distress.

Goods sent to an auctioneer for sale on premises occupied by him, are privileged from distress for rent; although the place of sale is merely hired for the occasion,—or the occupation has been acquired by the auctioneer by an act of trespass. *Brown v. Arundell*, 54

AWARD.

See ARBITRAMENT.

BANKRUPT.

I. Fraudulent Preference.

1. The effect of a bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once, by the bankruptcy, in the assignees, independently of any election of their part, other than their acceptance of the office of assignee: but, by a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, at their election, and the title of the transferee is perfect, except so far as it is avoided by the assignees. *Newham v. Stevenson*, 713
2. The commencement of an action of trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot, without more, be taken to be an election on the part of the assignees to avoid the transfer. *Id.*
3. Where, therefore, goods had been transferred by a trader before his bankruptcy, by an instrument which the jury found to be a fraudulent preference, and the transferee had, after the bankruptcy, and after the appointment of assignees, brought an action for an illegal and excessive distress upon the goods which were the subject of the conveyance:—Held, that,—the assignees having no otherwise asserted their right to the goods than by commencing an action of trover to recover them,—it was not competent to the defendant to set up their title under “not possessed.” *Id.*

II. Liability of Messenger, for seizing goods of a Stranger.

Demand of Warrant.—A messenger in bankruptcy, who, intending to act *bonâ fide*, under a warrant directing him to seize the goods of A., seizes goods belonging to B., is not with-

in the protection of the 12 & 13 Vict. c. 106, s. 107, and therefore is liable in trespass at the suit of B., without a previous demand of the perusal and copy of the warrant under which he professed to be, and believed he was, acting. *Munday v. Stubbs*, 432

III. Deed of Arrangement.

The 224th section of the bankrupt law consolidation act, 12 & 13 Vict. c. 106, makes a deed of arrangement, if executed by or on behalf of six-sevenths in number and value of the creditors of the trader, under certain circumstances, binding on the whole body:—Held, that a plea setting forth a deed of that description, and stating that the creditors who executed it were “more than six-sevenths, to wit, nine-tenths in number and value,” was sufficient, on special demurrer, and not open to the objection of argumentativeness or immateriality. *Stewart v. Collins*, 634

BARON AND FEME.

See HUSBAND AND WIFE.

BARRISTER.

Privilege of.

A barrister, party to a cause, cannot be allowed to address the court, where he is represented by counsel. *Newton v. Chaplin*, 356

BILL OF EXCHANGE.

I. Acceptance.

1. Held, that one who individually accepts a bill addressed to a firm of which he is a member, is individually liable thereon. *Owen v. Van Uter*, 318
2. A bill was addressed to “The Alty-Crib Mining Company,” and accepted by the defendant, as follows,—“*Per proc.* The Alty-Crib Mining Company, W. T. Van U., London Manager.” It was proved that four persons, one of whom was the defendant, had agreed to work a mine, under the name of The Alty-Crib Mining Company, and had for some time worked it accordingly; and that the bill in question had been accepted by the defendant without the authority of his copartners:—Held, that the defendant was liable upon the bill, as acceptor. *Id.*

II. Payment *suprà* Protest.

1. Where a foreign bill is paid *suprà* protest, for the honour of an endorser, the bill must be protested for non-payment before the payment for honour is made; but the formal instrument of protest may be drawn up, or extended, at any time afterwards,—even after the commencement of an action by the person so paying against the endorser for whose honour the payment was made. *Geralopulo v. Wieler*, 690
2. Where, therefore, a bill had been duly paid

supra protest, and a formal protest transmitted abroad to the party for whose honour the payment was made,—*Quare* whether secondary evidence of the protest was admissible? *Geralopulo v. Wieler*, 690

3. But, held, that a formal protest extended by the notary from his book, after the commencement of the action, but bearing date the day of actual protest, was *primary* evidence of the payment *supra* protest. *Ib.*

III. Parol Contract inconsistent with.

1. It is not competent to the acceptor of a bill of exchange to set up a parol contract inconsistent with the contract upon the face of the bill. *Besant v. Cross*, 895
2. In *assumpsit* by endorsee against acceptor of a bill of exchange, the defendant,—being under terms,—pleaded to the further maintenance of the action, that he was indebted to the drawer in a sum less than the amount of the bill; that, before the acceptance, it was agreed between him and the drawer, that he should pay him such lesser sum by four instalments; that he duly paid three of such instalments before, and the fourth after, the commencement of the action; and that the bill was endorsed to the plaintiff without value or consideration:—Held, not an issuable plea. *Ib.*

BILL OF LADING.

See SHIPPING.

BOND.

Payment.

Post diem.—1. A plea of *part* payment, *post diem*, to debt on bond, is a good plea, under the 4 Anne, c. 18, s. 12, after verdict. *Husband v. Davis*, 645

To one of two Trustees.—2. Payment of a bond debt to one of two trustees, is a good discharge as to both. *Ib.*

And see ESTOPPEL, II.

CASE.

For Breach of Duty.

1. The declaration stated that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides,—that the anchor had become removed into, and remained in, another part of the river covered by ordinary tides, not indicated, whereof the defendants had notice, and although they had the means and power of refixing and securing the anchor, and indicating it, they neglected so to do, whereby the plaintiff's vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged, &c.:—Held bad, on demur-

rer, for not showing that the defendants were privy to the removal of the anchor, or that it was their duty to refix it and to indicate it. *Hancock v. The York, New Castle, and Berwick Railway Company*, 348

2. By an act for making a railway, the company were authorised to purchase the church of St. M., in Liverpool, and certain ground and buildings attached thereto, not forming part of the site of the church, but that nothing in the act contained should enable the company to take down or interfere with the said church or ground, without the consent in writing of the diocesan first obtained, upon the previous payment by the company to him and the Archbishop of York, for the time being, of such sum as should be agreed upon between the said archbishop and bishop and the company,—in ascertaining which sum, regard was to be had to the costs of a site for a new church, and of erecting and completing the same, and also to the value of such part of the premises as did not form the site of the church; and that, upon payment of the sum so to be agreed upon, the then present church, and the ground attached thereto not forming the site of the church, and the freehold and inheritance thereof, should vest in the company; and that the sum so paid to the archbishop and bishop should be employed by them, among other purposes, in making payment to the person entitled thereto of the value of the said ground and buildings not forming part of the site of the church.

The archbishop and bishop, having agreed with the company, offered the plaintiff, the incumbent of the church of St. M., and the person entitled to the ground and buildings not forming part of the site of the church, 800*l.* as the value of his interest therein,—upon the assumption, that, being consecrated ground, it was in his hands inapplicable to any secular purpose, and was therefore only worth that sum. The plaintiff thereupon brought an action upon the case against them.

The declaration, after setting forth the provision of the act above referred to, stated, that the plaintiff was entitled to the value of the land and premises not forming the site of the church; that it was afterwards agreed between the company and the defendants, that the sum of 773*l.* 17*s.* should be paid by the company to the defendants, as the sum upon the payment whereof the company were to be authorised to take possession of the said church and premises, and take down the church, with the consent of the diocesan; that the said sum was paid to the defendants, and thereupon the premises became and were vested in the company, and the bishop gave his consent accordingly; that the said sum was sufficient to purchase a site, and complete the new intended church, and also to pay the

value of so much of the said ground and buildings as did not form the site of the church; and that the value of the said ground and buildings was 2,000*l.*, which sum the defendants were requested to pay the plaintiff,—but which they refused to pay, and had not paid, although a reasonable time for so doing had elapsed.

At the trial, the judge told the jury that the plaintiff was not concluded as to the value of the ground and buildings so vested in him, and not forming part of the site of the church, by the determination of the archbishop and bishop under the act; and he left the question of value to them, telling them that they were not bound to estimate the value as of land irrevocably appropriated to spiritual uses:—

Held, that the jury were properly directed; and that the declaration sufficiently disclosed the duty of the defendants under the statute, and that the breach was well alleged. *Hilcoat v. The Archbishop of Canterbury*, 327

CATTLE.

Conveyed by Railway—See RAILWAY COMPANY, II.

CERTIFICATE.

For Special Jury—See SPECIAL JURY.

COALS.

Patent fuel,—an article composed of coal-dust, mixed with 13 per cent. of pitch and lime,—is not liable to the duties imposed upon “coals” imported into the port of London, by the statute 1 & 2 W. 4, c. lxxvi. ss. 23, 60 (continued by the 1 & 2 Vict. c. xl. and 8 & 9 Vict. c. xl.),—notwithstanding that there is no purpose to which ordinary pit-coal can be applied, to which coal-dust, without the admixture of pitch and lime, could not also be applied. *The Mayor, &c., of London v. Parkinson*, 228

COLLECTOR OF TAXES.

See ESTOPPEL, II.

COMMISSION.

To examine Witnesses abroad—See EVIDENCE, III.

COMPANY.

See JOINT-STOCK COMPANY.
RAILWAY COMPANY.

CONTINGENT DAMAGES.

See COUNTY COURT, II. 2.

CONTRACT.

I. Construction of.

1. The declaration stated, that, on the 7th of July, 1848, it was agreed between the plain-

tiff and the defendant, that the defendant and his wife should, from that day, for the term of three months, appear and perform as equestrians, on the stage and in the ring, in all performances and entertainments which might be produced at Astley's Amphitheatre, or elsewhere, under the direction of the plaintiff, in such parts and in such manner as the plaintiff should require, and should attend all rehearsals and calls, when so required, for a certain weekly salary. It then, after averring mutual promises, alleged for breach, that, although the plaintiff had an establishment at Peebles, in Scotland, under his direction, for equestrian performances and entertainments, and although, under and in pursuance of the agreement, and during the subsistence of it, and before the expiration of the term of three months, to wit, on, &c., the plaintiff gave notice to the defendant that he the plaintiff required the defendant and his wife to join the plaintiff's said establishment at Peebles, for the purpose of appearing and assisting in the performances and entertainments to be produced at the said establishment at Peebles, and although a reasonable time had elapsed, after the giving of the notice, and before the commencement of the suit, for the defendant and his wife to join the said establishment at Peebles, for the purpose aforesaid,—yet that the defendant and his wife would not, when so required as aforesaid, or at any time afterwards, join the said establishment of the plaintiff at Peebles, or appear or assist in the performances and entertainments to be produced there, but refused and neglected so to do, &c.

- Held, on demurrer, that the promise to appear in any place, under the direction of the plaintiff, in the performances described, in such parts and manner as the plaintiff should require, and to attend all calls and rehearsals, involved an engagement so to join an establishment of the plaintiff for equestrian performances, as to be ready to accomplish the objects of the requisition; and that a failure to comply with such a requisition, and a refusal to assist in such performances, were sufficiently alleged to show a breach of the defendant's contract. *Batty v. Melillo*, 282
2. Held also, that it sufficiently appeared that the performances at which the defendant and his wife were required to assist, were performances of the description contracted for; that the absence of an averment that a reasonable time had elapsed after the notice, and before the expiration of the three months, was obviated by the statement in the declaration that the writ issued on the 23d of August, 1848, and by the averment that such time had elapsed before the commencement of the suit; and that the breach, substantially showing an entire refusal of the defendant to perform his contract, disclosed a good cause of action. *Id*

II. *Obtained by Fraud.*

3. A contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor; and it is too late to declare such election after the goods have passed into the hands of a *bona fide* purchaser. *White v. Garden*, 919

4. A., a member of the orchestra of the Italian Opera, "on behalf of the orchestra," signed the following proposal:—"The gentlemen of the orchestra are willing, and hereby pledge themselves, to continue their services, and attend their duties, provided B. will guaranty the payment of the thirteen nights due on the 5th ult." B. accepted the proposal by writing in these terms,—"B. will accept the proposition made by A., on behalf of the gentlemen of the orchestra, and he will appoint the treasury to be open on the 9th inst. to pay the thirteen nights due on the 5th ult, and he pledges himself to open the treasury on the 10th and 25th of August, to make further payments."

A. in his own name brought an action for a breach of this engagement, describing it in his declaration as a contract made with him and the other performers:—Held, that it was a joint contract. *Lucas v. Beale*, 739

Express Warranty.]—5. Upon a contract for the sale of goods, with a particular express warranty, the court will not extend such warranty by implication. *Dickson v. Zizinin*, 602

6. The declaration stated a bargain for the sale by the defendants to the plaintiff of a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano, on board the Ottoman, at a certain price, including freight and insurance to Cork, Liverpool, or London, and that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of that article in the season of 1847, and that the said Indian corn had been shipped in good and merchantable condition; and alleged for breach, that the corn was not, at the time of shipment, or at any other time, in good and merchantable condition, or in a fit and proper condition for the performance of the voyage from Orfano to Cork, &c.

The judge left it to the jury to say whether the corn was, at the time of shipment, in a good and merchantable condition for a foreign voyage:—Held, a misdirection; inasmuch as it was extending by implication the express warranty contained in the contract. *Ib.*

And see SALE.

CONVEYANCE.

Construction of.

A deed purported to convey "all that messuage or farm-house, &c., and several closes, &c., of land thereto belonging, called Gotton Farm, in the occupation of J. S., and containing, &c., and consisting of the several par-

ticulars specified in the first division of a schedule thereunder written, and more particularly delineated in a map or plan thereof drawn in the margin of the said schedule." There were no general words.

In an action brought to try the right to a slip of land, which was not mentioned either in the schedule or in the plan above referred to, evidence was offered on the part of the defendant to show that the *locus in quo* had always been occupied with the closes mentioned and delineated in the schedule and plan, and treated as part of Gotton Farm:—Held, that this evidence was not admissible, and that the deed was conclusive. *Barton v. Davies*, 261

COSTS.

I. *Of Issues under the 4 Ann. c. 16, s. 5.*

1. A plaintiff may be entitled, under the statute 4 Ann. c. 16, s. 5, to the costs of issues of fact found for him, even though, upon the whole record, he appears to have had no cause of action. *Cullander v. Howard*, 302

2. To assumpsit upon certain bills of exchange, with a count for goods sold and delivered, money paid, and interest, and a count upon an account stated, the defendant pleaded sixteen pleas, to one of which (going to the whole cause of action) there was a demurrer. Upon the trial, all the issues of fact were found for the plaintiff; and, upon the argument of the demurrer, the judgment was for the defendant:—Held,—contrary to Partridge v. Gardiner and Howell v. Rodbard, 4 Exch. 303, 309, and affirming Bird v. Higginson, 5 Ad. & E. 83, 6 N. & M. 799, and Clarke v. Allatt, ante, Vol. IV. 335,—that the plaintiff was entitled to the costs of the issues of fact, though the defendant had the general costs of the cause. *Ib.*

II. *Set-off between Parties.*

A cause and all matters in difference between A. and B. were referred to an arbitrator, who was to have power to direct the verdict to be entered for A. or for B.—the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, by his award, directed a verdict to be entered for B., and awarded that 303*l.* 15*s.* was due from B. to A. in respect of the matters in difference, and which sum he ordered to be paid by B. to A. on a given day:—Held, that B. was entitled to deduct from the sum so awarded to be paid by him, the amount of his taxed costs of the cause,—without regard to the lien of A.'s attorney for his costs of the cause and of the reference. *Dunn v. West*, 420

III. *Where debt recoverable in a County Court*—See COUNTY COURT, V.

IV. *Taxation of, on Award.*
See ARBITRAMENT, III.

V. Suggestion to deprive Plaintiff of.
See COUNTY COURT, V.

COUNTERPART.

See STAMPS.

COUNTY COURT.

I. Constitution of Court.

Semble, that the courts created under the statute 9 & 10 Vict. c. 95, though courts of record, are not superior courts. *Levy v. Moylan*, 189

II. Notice of Action for a Thing done in Pursuance of the Act.

1. The 138th section of the county courts act 9 & 10 Vict. c. 95, enacts, that, in actions and prosecutions to be commenced against any person for anything done in pursuance of the act, notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action.

In case against a judge of a county court for making an order for committing the plaintiff to gaol for disobedience of an order for payment of certain instalments, after due service upon him of a writ of prohibition, the jury were told, that, if the defendant acted under a *bond fide* belief that his duty as judge of the county court rendered it incumbent on him to do so notwithstanding the prohibition, the act must be considered as done in pursuance of the county court act, and he was entitled to notice of action:—Held, no misdirection. *Booth v. Clive*, 827

2. Where, in such a case, the judge, in the presence of the counsel, directs a verdict for the defendant, but at the same time tells the jury to assess damages for the plaintiff contingently, and the counsel do not object,—it is not competent to the plaintiff afterwards to move for a new trial on the ground of misdirection: he can only move to enter a verdict for the damages so contingently assessed. *Ib.*

III. Title to Toll, under 9 & 10 Vict. c. 95, s. 58.

In a plaint brought in a county court against a railway company, to recover damages for expense and loss of time sustained by the plaintiff in consequence of the improper omission of the company to convey goods on their line, a question was raised as to the right of the company to charge toll for empty wagons:—Held, that the "title to toll" did not thereby come in question, within the meaning of the proviso in the 9 & 10 Vict. c. 95, s. 58. *Hunt v. The Great Northern Railway Company*, 900

IV. Warrant of Commitment.

1. *Currency of.*—A warrant of commitment for contempt, under the 9 & 10 Vict. c. 95, s. 99, for non-appearance on a judgment summons, is regular, though issued more than six

months after the date of the judge's order,—notwithstanding, that, by the 37th rule of practice of county courts, a warrant is to be current only for two months after its date. *Ex parte O'Neill*, 57

2. *Alternative.*—Held, that a party ordered to pay a sum recovered against him in the county court, who has made default, and, upon being examined upon a judgment summons, shows no sufficient excuse for such default, may be committed to prison forthwith; but that, if the judge orders him to pay the money at a future day, or, in default, to be committed, and the party again makes default, he cannot be committed without being examined as to the cause of such second default. *Abley v. Dale*, 62

3. Plea, to an action by A. against B. for false imprisonment,—that a judgment was recovered by B. against A. in the county court, for a sum ordered to be paid by instalments; that A. was summoned, under s. 98, of the 9 & 10 Vict. c. 95, to show cause why he had not paid the instalments; that he appeared to the summons, and that the judge ordered him to pay the debt and costs on a given day, or, in default, that he should be committed for twenty days; and that he made default, and was thereupon arrested, and carried to gaol, &c.:—Held, bad. *Ib.*

4. *Justification under.*—A warrant of commitment under the 9 & 10 Vict. c. 95, s. 113, recited that A. "did wilfully insult the judge of the county court, during his sitting, and therefore the said judge did order that A. should be taken into custody, and detained until the rising of the court:" it then proceeded,—“these are, therefore, to require you, the high-bailiff, &c., to take the said A., and to deliver him to the governor of the house of correction,” &c., to be there detained for seven days, &c.:—Held, that the warrant was good upon the face of it, and justified the officer and the gaoler in taking A. *Levy v. Moylan*, 189

V. Plaintiff's Right to Costs.

1. *Under 10 & 11 Vict. c. lxxi. s. 115.*—Where the demand in an action of contract is reduced below 20*l.* by a plea of tender and payment into court, the defendant cannot have a suggestion to deprive the plaintiff of costs, under the London small debts act, 10 & 11 Vict. c. lxxi. s. 115. *Crosse v. Seaman*, 884

2. *Under 13 & 14 Vict. c. 61, s. 11.*—A judgment on demurrer is not a judgment by default within the meaning of the 13 & 14 Vict. c. 61, s. 11. *Prew v. Squire*, 912

3. Where, therefore, a plaintiff recovered less than 20*l.* upon an assessment of damages upon a writ of inquiry after a judgment on demurrer:—Held, that he was not entitled to costs. *Ib.*

4. *Quare*, whether the word "verdict," in s. 12, is limited to a verdict upon an issue joined? *Prew v. Squire*, 912

VI. Appeal from Decision of.

1. A. was clerk to B. under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or payment of three months' salary. B. dismissed A. without notice, under circumstances which a county court judge decided not to be a legal justification for such dismissal, and afterwards sued him for money had and received:—Held,—upon an appeal under the 13 & 14 Vict. c. 61, s. 14,—that A. was entitled to set off in that action the amount of the three months' salary; and that the decision of the county court judge upon the facts could not be reviewed. *The East Anglian Railway Company v. Lythgoe*, 726
2. *Semble*, per MAULE, J., that the convenient construction of 14th section would be, that an appeal lies not in any case where the county court judge performs the functions of a jury. *Id.*

COVENANT.

I. Construction of.

A declaration in covenant recited a deed of the 2d of March, 1841, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements: in this deed, the piece of land in question was described as "a slip of land then being intended to be formed into a new course for the river Beult." The declaration then made profert of the deed of covenant upon which the action was brought, and stated that the defendants thereby covenanted with the plaintiffs, that they, the defendants, should and would, within a reasonable time, "at their own costs and expenses, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river into the said intended new course for the same." It then went on to state a covenant to make a bridge over the intended new cut, for the plaintiff's use, within a given time, and a covenant to make good the banks of the new cut, and, after the same should have been so made good, and the railway completed, to re-convey to A., one of the plaintiffs, the slip of land which should form the new course of the river, and also to fill up and level the then existing course, so far as the same should have been diverted. The declaration then charged breaches of covenant, in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting its banks, in not re-conveying to A. the slip of land "with the water of the said river duly diverted into the said new course," and in not filling up the existing course of the Beult, "so far as the

stream thereof should and ought to have been diverted as aforesaid."

The defendants, after cravingoyer of the deed of covenant, and setting it out *in hæc verba*, demurred generally to the declaration.

The deed, as set out onoyer, did not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river; but it did contain express covenants to the effect of all the other covenants stated in the declaration:—Held, that there was no implied covenant on the part of the defendants to make the cut, and divert the stream of the Beult; and, consequently, that there could be no breach of the express covenants, to build the bridge, &c., unless the cut was made, and the stream diverted. *Rashleigh v. The South Eastern Railway Company*, 612

II. In Restraint of Trade.

A butcher on assigning, for the residue of a term, contain premises upon which he had carried on his business, together with the fixtures and the goodwill of the trade, covenanted with the purchaser that he would not at any time thereafter, either by himself, or as agent or journeyman for another, set up, exercise, or carry on, or be employed in, the trade or business of a butcher, within five miles from the premises thereby assigned:—

Held, not an unreasonable restraint, either in respect of time or in respect of distance; and that the covenant did not cease to be a binding covenant, on the expiration of the term, or on the covenantee's ceasing by himself or his assigns, to carry on the business assigned. *Bloes v. Crofte*, 241

DAMAGES.

See COUNTY COURT, II. 2, V. 3.
PRACTICE, III.

DANISH OATH.

See EVIDENCE, III. 2.

DECEIT.

See LANDLORD AND TENANT, I.

DEED OF ARRANGEMENT.

See BANKRUPT, III.

DEFAMATION.

See SLANDER.

DEMURRER.

See COUNTY COURT, V. 2, 3.

DEMURRER BOOKS.

Delivery of.

Where the plaintiff has delivered all the de-

murrer books, he cannot call upon the defendant to pay for those delivered to the junior puisne judges, as a condition of his being heard, unless he has himself strictly complied with the rule of Hilary Term, 4 W. 4, by delivering the books for the defendant on the day following that on which the defendant should have delivered them. *Hooper v. Woolmer*, 370

DEVISE.

Construction of.

Testator, in contemplation that his death was approaching, devised lands to his wife for life, with remainder in fee to his nephew,—with a condition, that, if his wife should give birth to a posthumous child, such child should take, to the exclusion of the nephew. A child being afterwards born, in the testator's lifetime.—Held, that such child did not take by implication under the will. *Doe d. Blakiston v. Haslewood*, 544

DISCLAIMER.

See LETTERS PATENT, II.

DISTRESS.

See AUCTIONEER, II.

DOWER.

Under the Statute of Merton.

1. *Damages.*—To a count in dower under the statute of Merton, the tenant pleaded *tout temps priet*: the demandant replied a demand and refusal to render dower, before the suing out of the writ, to which the tenant rejoined by a traverse of the demand. The issue having been found for the demandant,—Held, that she was entitled to damages, to be computed from the decease of her husband. *Watson, D., Watson, T.*, 3
2. *Demand.*—*Semble*, that a demand of dower need not be made by the widow personally, or in the presence of witnesses. *Id.*

DUPLEX QUERELA.

See ECCLESIASTICAL LAW.

ECCLESIASTICAL LAW.

Appeal to the Judicial Committee of the Privy Council.

By the 24 H. 8, c. 12, ss. 2, 5, 6, 7, 8, all causes within the spiritual jurisdiction, relating to wills, to matrimony, and divorce, and to tithes, oblations, and obventions, were to be determined in the King's courts; and where, in such cases, the appeal used to be made to the see of Rome, it was thenceforward to be carried from the archdeacon's court (if commenced therein) to the bishop's court, and from the bishop's court to that of the arch-

bishops, whose decision was to be final. By a. 9, in case any such cause should touch the King, the appeal from any of the said courts was to be made to the upper house of convocation for the province.

By the 25 H. 8, c. 19, ss. 2, 4, no appeal was to be made to Rome in any cause arising within this realm; but all appeals were to be made in the manner limited by the 24 H. 8, c. 12, for causes of matrimony, tithes, oblations, &c. An ulterior appeal was given, for lack of justice in the archbishop's courts, to the King in Chancery; and, on such appeal, a commission under the great seal was to issue to such persons as the King should name, to hear such appeal. The judicial committee of the privy council was substituted for such commission, by the statutes 2 & 3 W. 4, c. 92, a. 3, and 3 & 4 W. 4, c. 41, a. 3:—

Held, that, if the crown presents a clerk to a vicarage in its gift, and the ordinary refuses to admit him, on the ground that he maintains unsound doctrine, and, on a *duplex querela* brought in the archbishop's court, the judge, for the same reason, pronounces sentence confirming such refusal to admit,—the appeal lies to the judicial committee of the privy council, and not to the upper house of convocation. *Ex parte The Bishop of Exeter, in re Gorham v. The Bishop of Exeter*, 102

EJECTMENT.

Service of Declaration and Notice.

Joint Tenants.—Service of a declaration and notice in ejectment, upon one of two joint tenants, the notice being addressed to that one only, is not sufficient. *Doe d. Braby v. Roe*, 663

ESTOPPEL

I. Demise by Estoppel.

A., in May, 1823, demised premises to B. for 80 years, with a proviso for re-entry in case the lessee, his executors, &c., should exercise or carry on, or permit to be exercised or carried on, the business (amongst others) of a victualler or publican. B., in November, 1823, mortgaged to C., and in June, 1829, the mortgage term was assigned to D., and ultimately became vested in E.

After B. had assigned to C. and when he had no reversion, but a mere equity of redemption, he, by indenture, granted an underlease for 76 years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the same assignments were made subject to this underlease.

In ejectment by the legal representatives of E. for a breach of the covenant in the original lease, in using the premises as a public house or beer shop:—

Held,—first, that the underlease granted by B. operated merely as a demise by estoppel, inasmuch as he had not at the time of making it, or since, any legal interest;—secondly, that the lessors of the plaintiff, or the persons under whom they claimed, not being parties to the underlease, or to any of the assignments which recognised and referred to it, were not bound by any covenants contained therein;—thirdly, that the payment to, and acceptance by, B. of rent under the underlease by B. to F., merely created a tenancy from year to year; and that such tenancy was well determined by a notice to quit served upon the attorney of the administratrix of the person who had paid the rent to the lessors of the plaintiff, and under whom the defendant claimed. *Doe d. Prior v. Ongley*, 25

II. By Recitals in Bond.

1. Sureties in a bond given by a collector of property and income tax, under the 5 & 6 Vict. c. 35, conditioned for the due collection and payment of the sums assessed under the act, are not liable in respect of moneys collected by him without legal authority,—that is, before he is furnished with the duplicate assessment and warrant to collect, as mentioned in the 172d section of the statute. *Kepp v. Wiggott*, 35
2. The condition recited that A. "had been duly nominated and appointed a collector for the year ending, &c.; and that duplicates of the assessments had been delivered and given in charge to him, with a warrant or warrants for collecting the same"—Held, in an action against the sureties, for A.'s default, that they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, and that the duplicate assessments and warrant to collect had not been delivered to him. *Id.*

III. Between Parties to Deeds.

In covenant upon an annuity deed,—Held that the defendants (executors) were estopped from pleading that the deed was made fraudulently and collusively between the testator and the plaintiff, for the purpose of multiplying voices, and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by the indenture. *Phillipote v. Phillipote*, 85

EVICITION.

See PLEADING, VI. 4.

EVIDENCE.

I. To explain a contract—See SALE, 3.
And see CONVEYANCE.

II. Secondary, where receivable.

1. Where a written document is in the possession

of a witness who is not compellable to produce it, and he refuses to do so, secondary evidence of the contents is admissible. *Newton v. Chaplin*, 356

2. Where a person, not a party to a suit, attends on a common *subpoena*, and is called as a witness, and refuses to permit the production of a document which his attorney has brought into court in obedience to a *subpoena duces tecum*, but which the latter also declines to produce; the plaintiff, having done everything that could be done to make apparent the impossibility of using the primary means of proof, is entitled to resort to secondary evidence of the contents, and is not precluded from so doing by his omission to serve the client with a *subpoena duces tecum*. *Id.*
And see BILL OF EXCHANGE, II. 2.

III. Commission for examination of Witnesses abroad.

1. Oath of Commissioners dispensed with.]—Where a commission issues for the examination of witnesses in a foreign country, the oath of the commissioners may, under special circumstances, be dispensed with. *Boelen v. Melladeu*, 898
2. Form of Oath of Witnesses in Denmark.]—By the law of Denmark, none but burgomasters have power to administer oaths; and the mode of administering an oath to a witness, is, by causing him to hold up three fingers of his right hand, and declare that he will speak the truth. A commission having failed, for want of the observance of these formalities,—the court, on payment of all costs, allowed a second commission to go, addressed to burgomasters. *Id.*

EXECUTED CONTRACT.

See LANDLORD AND TENANT, II. 2.

EXECUTION.

Against a Shareholder—See JOINT STOCK COMPANY.

EXPRESS WARRANTY.

See CONTRACT, 5, 6.

FACTOR.

Lien of.

1. A factor can only claim a lien for his general balance, upon goods which come to his hands as factor. *Dixon v. Stansfeld*, 398
2. A. & Co., who carried on business at Hull, as merchants, factors, ship and insurance brokers, and general agents, had had various dealings, as factors, with B. & Co., of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co., requesting them to get a policy of insurance

affected for them on the ship *Exporter*, for a voyage from the Downs to South America, and thence to the West Indies. A. & Co. procured the insurance to be effected, and B. & Co. remitted them the premiums,—the policy remaining in the hands of A. & Co.:—Held, that A. & Co. were not entitled to hold the policy as a lien for the general balance due to them, *as factors*, from B. & Co. *Dixon v. Stansfeld*, 398
And see *SALE*, 2.

FRAUD.

See *CONTRACT*, II.

FRAUDULENT CONVEYANCE.

See *ESTOPPEL*, III.
PARLIAMENT.

GUARANTEE.

Construction of, and how declared on.

1. A. & Co. wrote to B., "We are doing business with C., and we require a guarantee to the amount of 200*l*., and he refers us to you for one." B. replies, "In reply to yours, I beg to say that I have no objection to become security for C., and subjoin the following memorandum to that effect." The subjoined memorandum was,—*"I hereby engage to guaranty to A. & Co. the sum of 200*l*., for iron received from them for C. as annexed:"*—Held, a good consideration to support an assumption. *Coldbourn v. Dawson*, 765
2. *Seem*, that, if necessary, evidence was admissible to explain the meaning of the words "for iron received." *Id.*
3. A declaration upon this guarantee stated, that, in consideration that the plaintiffs, at the request of the defendants, would sell and deliver iron to C. on credit, the defendant promised the plaintiffs to guaranty to them the price of the said goods to the amount of 200*l*.:—Held, that the consideration and the promise were well laid. *Id.*

HABEAS CORPUS.

See *PRISONER*.

ORSES.

Conveyed by Railway—See *RAILWAY COMPANY*, II.

HUSBAND AND WIFE.

Liability of Husband for his Wife's Funeral.
The husband is liable for the necessary expense of the decent interment of a wife from whom he has been separated,—whether the party incurring such expense is an undertaker or a mere volunteer. *Ambrose v. Kerrioon*, 776

INDEMNITY.

See *LANDLORD AND TENANT*, II.

INQUIRY, WRIT OF.

See *COUNTY COURT*, V. 2, 3, 4.

INSOLVENT DEBTOR.

I. *Discharge of.*

1. By an order of adjudication by a commissioner of the insolvent debtors' court, purporting to be made pursuant to the 1 & 2 Vict. c. 110, ss. 76, 78, the prisoner was adjudged to be discharged as to all the debts in his schedule, at the expiration of six months from the date of the vesting order, except as to four debts, which the commissioner found to have been contracted by means of a breach of trust, and as to which the prisoner was ordered to be discharged at the expiration of sixteen months from the date of the vesting order:—Held, that, whether the commissioner had or had not jurisdiction to make the latter part of the order, the first part was no discharge as to the four excepted debts. *Ex parte Violet*, 891
2. Plea of discharge—See *PLEADING*, VI. 5.

II. *What Rights of Action of the Insolvent pass to his Assignees.*

1. A., being sued by B., retained C., an attorney, to defend him. By C.'s negligence, a judgment was obtained against A., upon which he (being then in custody) was charged in execution for a large sum and was put to expense, in endeavouring to procure his release, and to reverse the judgment, by writ of error:—Held, that this was not a cause of action which passed to A.'s assignees, upon his insolvency. *Wetherell v. Julius*, 267
2. A., a beneficed clergyman, brought case against his attorneys, for having, through their negligence and want of skill, permitted a writ of *sequestrari facias* to remain in force against him longer than was necessary, whereby A., during that time, lost the rent, tithes, and profits of his living:—Held, that this was a cause of action which passed to A.'s assignees, upon his insolvency. *Id.*

III. *Messengers' Fees.*

The trade assignee of a petitioner under the insolvent debtors' acts, 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable personally for the messengers' fee and expenses, in the absence of an express contract. *Hamber v. Hall*, 760

INSURANCE BROKER.

See *FACTOR*.

JOINT STOCK COMPANY.

Execution against a Shareholder.

1. *How obtained.*—The proper course to obtain execution against a shareholder of a public company, under 8 & 9 Vict. c. 16, s. 36, is, by motion for a *scire facias*, and not by a motion for a rule to show cause why execution should not issue against such shareholder. *Hitchins v. The Kilkenny and Great Southern and Western Railway Company, In re Emery*, 160
2. *Form of Affidavit.*—A *scire facias* will not be granted upon an affidavit merely stating that judgment has been obtained against the company, and that two writs of *f. fa.* issued against them, had been returned *nulle bona*. *Id.*

JUDGMENT BY DEFAULT.

See COUNTY COURT, V. 2, § 4.

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, I.

JURY.

See SPECIAL JURY.

JUS TERTII.

See BANKRUPT, I. §.

LANDLORD AND TENANT.

I. *Relative Rights and Duties.*

There is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation: and no action will lie against him for an omission to do so, in the absence of express warranties, or active deceit. *Keates v. The Earl of Cadogan*, 591

II. *Contract of Tenancy.*

1. In assumpsit, the first count stated, that A. and B. were tenants of certain chambers to one C. at a certain rent, payable quarterly; and that, in consideration that A. and B. would underlet the chambers to D. at a certain rent, payable quarterly, D. promised A. and B. that he would pay the *said rent* to C., and that, if he should not do so, he would indemnify A. and B. in respect thereof, and pay the same to them: and the breach assigned was, non-payment by D. of the rent due from A. and B. to C. — Held, that, whether the declaration meant to allege the contract to have been, that D. should pay C. the rent due from A. and B. to C. or the rent due from D. to A. and B. under the demise which was the consideration for his promise, it was not to be taken as alleging that D.'s promise to pay C. was to extend further than his liability to pay rent under his own tenancy to A. and B. *Smith v. Lovell*, 6

2. The seventh plea stated, that, before the rent became due from A. and B. to C., it had been agreed between A., for and on behalf of himself and B., and with his authority, and D., that D. should deliver up the possession of the chambers to A., and that, in consideration thereof, D. should be discharged from further liability for rent; and that D. did accordingly deliver up possession to A., which he on behalf of himself and B. accepted: Held, that this plea set up a good defence by way of executed contract. *Id.*

III. *Tenancy from Year to Year*—See EJECTMENT, I.

LEASE.

Covenant to pay Rates.

Where a lessee covenants to pay rates and taxes, no demand is necessary, to constitute a breach, so as to entitle the lessor to avail himself of the proviso for re-entry. *Davis v. Burrell*, 821

And see EJECTMENT, I.

STAMPS.

LETTERS PATENT.

I. *Construction of Specification.*

1. A claim for a patent for improvements in the mode of doing something by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim or to the same process altered and improved by discoveries not known at the time of the claim, so long as it remains identical with regard to improvements claimed, and their application. *The Electric Telegraph Company v. Brett*, 838
2. In case for the infringement of a patent "for improvements in giving signals and sounding alarms in distant places, by means of electric currents transmitted through metallic circuits," the breaches alleged in the declaration were, that the defendant had used and counterfeited the *said invention*: the evidence was, that the defendant had used or counterfeited *part only*. The specification described *nine* several improvements:—Held, that the declaration, in speaking of the *said invention*, was to be understood as charging the using or counterfeiting of the *said nine* improvements, and that it was sufficiently proved by showing that one of them had been used. *Id.*
3. The patentees' invention was described, as well in the title of the letters-patent, as in the specification, as an invention of "improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through *metallic circuits*." The defendant, it appeared, arrived at the same results by using a circuit not *wholly* or continuously metallic throughout, but by

using the earth, to an extent nearly amounting to the half, as the connecting medium between two portions of the metal. It appeared in evidence, that, after the grant of the letters-patent, it had been discovered that a large portion of the wire through which the electric current returned to the battery might be dispensed with, by plunging into the earth the two ends of wire which would have been joined by the parts left out, the electric current passing from one end of the wire to the other as effectually as if a continuity of wire had been kept up:—Held, that, though a circuit upon this principle would not be wholly metallic, yet, inasmuch as it was so in all that part which formed the substance of the patentees' claim, viz., that part which gave the signals, it amounted to an infringement of the patentees' right. *Electric Telegraph Co. v. Brett*, 838

4. The patent was for an improved method of giving signals, by means of several wires and converging needles pointing to letters. The defendant had used one wire, and had made signals by counting the deflections of a needle or needles,—which was found by the jury to be a different system from that of the plaintiffs:—Held, that, notwithstanding this finding, the plaintiffs were entitled to the verdict; for, that the specification showed that the patent was not for a system of giving signals, but for certain distinct and specified improvements, comprehending those in question,—the system being described only for the purpose of explaining the improvements claimed. *Id.*

5. One of the patentees' improvements was described as an improvement "whereby a set of combined conducting wires, as aforesaid, having a voltaic battery, and a set of buttons or finger-keys, and also a dial with vertical needles, for giving signals, as well as an apparatus for sounding alarms at each end of the set, may also have duplicates of such dials, with needles and apparatus for alarms, at intermediate places between the two ends; all such duplicates operating simultaneously with each other, and with the two end dials and alarms, to give like signals, and to sound like alarms." The jury found that, "the sending of signals to intermediate stations was new to the plaintiffs," that it, was a new invention of the patentees:—Held, that this was the fit subject of a patent; for, though it might be probable, *a priori*, that a circuit having a distant coil could have intermediate ones also, which would operate in the same manner, still it was matter of experiment that it could practically be done:—Held, also, that the patentees' claim was not affected by the circumstance of the defendants having improved upon it, so as to enable those at the intermediate stations to send as well as to receive communications. *Id.*

II. Disclaimer.

A count in a *scire facias* to repeal a patent granted to the defendant "for improvements in instruments used for writing and marking, and in the construction of inkstands," contained suggestions (amongst others) of want of novelty and utility in "a certain part" of the said invention. The objections filed with the declaration, pursuant to the 5 & 6 W. 4, c. 83, s. 5, pointed out the sixth claim in the specification (amongst others), as wanting novelty, and being useless. The pleas traversed all the suggestions in the count.

After issue joined, the defendant filed a disclaimer, under the 5 & 6 W. 4, c. 83, s. 1, of the fifth, sixth, seventh, and eighth claims mentioned in his specification. These claims related to pens, and to instruments used for marking with a stamp. Those which remained untouched by the disclaimer, were for improvements in pen-holders and penoil-cases, and in the construction of inkstands:—

Held,—first, that the disclaimer, though filed and enrolled after issue joined, was admissible in evidence, and was to be read as part of the original specification, and need not be pleaded *pursuante* continuance:

Secondly, that the objections filed pursuant to s. 5 were not part of the record, so as to form parcel of the issues to be tried:

Thirdly, that, the disclaimer being received, the defendant was entitled to a verdict upon all the issues:

Fourthly, that the title of the letters-patent was satisfied by the specification, as amended by the disclaimer. *The Queen v. Mill*, 379

LICENSE.

Coupled with an Interest.

An auctioneer who is employed to sell goods by public auction, has not such an interest as will make the license to enter the premises for that purpose irrevocable. *Taplin v. Florence*, 44

LIEN.

See COSTS, II.
FACTOR.

LITERARY SOCIETY.

Exemption from Rates.

1. A society called "The London Library" was established for the purpose of lending books to its members, being supported in part by annual subscriptions, and in part by the voluntary contributions of its members, and precluded by its laws from making any dividend, gift, division, or bonus in money to or between any of its members:—Held, that such society, being duly certified under the 2d section of 6 & 7 Vict. c. 36, was exempted from rates, &c., under s. 1. *The Earl of Clarendon, app., The Rector, &c., of St. James, resp.*, 806

2. But, where portions of the premises leased by such society were underlet to other scientific bodies:—Held, that this was not such an exclusive occupation of the premises for the purpose of the society as to entitle it to the exemption. *The Earl of Clarendon, app., The Rector, &c., of St. James, resp.*, 806
3. Where upon appeal to the quarter sessions under this statute, a case is stated for the opinion of one of the superior courts, under the 12 & 13 Vict. c. 45, s. 11, costs are taxed as between party and party. *Id.*

LIVE STOCK.

Conveyed by Railway—See RAILWAY COMPANY, II.

LOCAL PAVING ACT.

Liability of Commissioners for salaries of Officers.

Indebitatus assumpsit will not lie against commissioners under a local paving act, for salary of officers whom the act authorizes them to appoint at a salary to be paid out of the rates to be raised thereunder. The proper remedy is, either by an action upon the case, or a *mandamus*. *Bogg v. Pearce*, 534

MALICE.

Proof of—See SLANDER, 3.

MANDAMUS.

See LOCAL PAVING ACT.

MEMORANDA.

Lord COTTENHAM, C., resignation of, 1.
 Sir THOMAS WILDE appointed Chancellor, 1.
 Sir JOHN JERVIS appointed Chief Justice of the Common Pleas, 2.
 Sir John Romilly appointed Attorney-General, 2.
 Sir Alexander James Edmund Cockburn, appointed Solicitor-General, 2, Attorney-General, 928.
 Sir LAUNCELOT SHADWELL, death of, 2.
 Sir JAMES WIGRAM, resignation of, 2.
 Mr. Baron ROLFE, appointed Vice-Chancellor, 2.
 SAMUEL MARTIN, Esq., appointed a Baron of the Exchequer, 2.
 Mr. Serjt. Allen, patent of precedence, 2.
 Mr. Serjt. Wilkins, patent of precedence, 2.
 Robert Miller, Esq., coifed, 2.
 Lord LANGDALE, M. R., resignation of, 928.
 William Page Wood, Esq., appointed Solicitor-General, 928.
 GEORGE JAMES TURNER, Esq., appointed Vice-Chancellor, 928.

MERGER.

See PLEADING, IX.

MESSENGER.

See BANKRUPT, II.
INSOLVENT DEBTOR, III.

MISDIRECTION.

See CONTRACT, 6.
SLANDER.

MISJOINDER.

See PLEADING, I.

NAVIGABLE RIVER.

Obstruction of—See CASE, I.

NEGLIGENCE.

See RAILWAY COMPANY, II.

NONSUIT.

Judgment as in Case of—See PRACTICE, I.

NOT POSSESSED.

See BANKRUPT, I. 3.

NOTICE OF ACTION.

See COUNTY COURT, II. 1.

PAPER BOOKS.

See DEMURRER BOOKS.

PARLIAMENT.

Multiplying Votes.

Under the statutes 7 & 8 W. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1, a fraudulent conveyance made for the mere purpose of conferring a vote, is void only to the extent of preventing the right of voting from being acquired, but is valid and effectual, as between the parties, to pass the interest. *Phillipotts v. Phillipotts*, 85

PARTNERS.

Acceptance of Bill by one of several—See BILL OF EXCHANGE, I.

PATENT FUEL.

See COALS.

PAVING ACT.

See LOCAL PAVING ACT.

PAYMENT.

See BILL OF EXCHANGE, II.
BOND.
PRACTICE, III.

PLEADING.

I. Misjoinder of Counts.

Counts alleging a promise to pay money upon a

good consideration, unconnected with any common law duty, and alleging for breach, nonpayment,—are counts in assumpsit; and cannot properly be joined with counts in case. *Courtenay v. Earle*, 73

II. *Issuable Pleas*.—See BILL OF EXCHANGE, III, 2.

III. *Plea amounting to Non assumpsit*.

1. Plea,—to an indebitatus count for goods sold and delivered, goods bargained and sold, and on an account stated,—as to 191*l*. parcel, &c., that the defendants made the promise in respect of goods, to wit, 31 pockets of hops, bargained and sold by the plaintiff to the defendants; that, at the time of the promise, the plaintiff produced and showed the defendants a sample, and promised to deliver the hops equal thereto; that they made their promise as to the said 191*l*. parcel, &c., on the faith, and in consideration of the said promise, and not otherwise; and that the hops were not equal to the said sample; wherefore the defendants refused to accept them:—Held, bad, on special demurrer, as amounting to non assumpsit. *Dawson v. Collis*, 523
2. *Quere*, whether the plea would not have been also bad for attempting to limit the plaintiff's proof to goods bargained and sold, if specially demurred to on that ground. *Id.*

IV. *Immaterial Issue*.

1. In assumpsit on the following memorandum,—"A. agrees to let, and B. to take, two rooms in the messuage of A., at the rent of 40*l*. per annum, payable quarterly; and B. agrees to pay the proportion of rates, taxes, and assessments, which now are, or hereafter may be, assessed on the premises so taken by B.,"—the declaration alleged, that, whilst B. was tenant, divers rates, &c., were assessed on the messuage; that the said rates, &c., became due on a certain day, and were paid by A.; and that the proper and reasonable proportion of the said last-mentioned rates, &c., to be paid by B. in respect of the demised premises, according to the agreement, was "a certain proportion thereof, to wit, one third part thereof, amounting, to wit, to 50*l*.,"—of all which B., before the commencement of the suit, had notice, and was then requested by A. to pay the same, &c.:—

Held, that a plea traversing the request to pay, was bad, as attempting to raise an immaterial issue. *Hooper v. Woolmer*, 370

2. Held also, that a special traverse, that "the proper and reasonable proportion of the said rates, &c., to be paid by B. in respect of the said demised premises, was a certain proportion, amounting to 12*l*. 10*s*., and no more,—*absque hoc*, that the said proper and reasonable proportion of the said rates, &c., was 50*l*., in manner and form, &c.," was bad, for the same reason. *Id.*

V. *Allegation of Times, &c., under a Videlicet*.

1. Where a contract is alleged in a declaration to have been entered into for a certain time and for a certain sum, going on to allege the time and sum under a *videlicet*, it is not necessary to prove a contract for that precise time or sum. *Harris v. Phillips*, 650
2. The declaration stated that the defendant agreed to hire of the plaintiff two horses "for a certain space of time, then agreed upon between the plaintiff and defendant, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward in that behalf, to wit, 50*l*. a year for each of the said horses, payable quarterly." The contract proved, was, a hiring from week to week, at 50*l*. a year for each horse, payable weekly: Held, that the variance was immaterial, the substance of the declaration being proved; for, that the words "hire and reward" involved the time as well as the amount of the hiring, and therefore that both were covered by the *videlicet*. *Id.*

VI. *Traverse Argumentative and too Large, &c.*

1. In assumpsit, the first count stated, that A. and B. were tenants of certain chambers to one C. at a certain rent, payable quarterly; and that, in consideration that A. and B. would underlet the chambers to D. at a certain rent, payable quarterly, D. promised A. and B. that he would pay the said rent to C., and that, if he should not do so, he would indemnify A. and B. in respect thereof, and pay the same to them: and the breach assigned was, nonpayment by D. of the rent due from A. and B. to C.

D. pleaded,—sixthly, a surrender (called a surrender by operation of law), by his delivering up the possession of the chambers to A., and A.'s accepting possession thereof, with the intention of putting an end to the tenancy; averring that A., in so accepting the possession, acted for and on behalf of himself and B., with B.'s authority. To this plea, A. and B. replied, that D. of his own wrong quitted possession of the chambers,—because they said that it was agreed between them, in consideration that D. would become tenant of the said chambers to A. and B., and indemnify them in respect of the rent, as in the first count mentioned, that, in case A. and B. should give notice to D. to terminate that agreement, and D. should be desirous of continuing his occupation of the premises as tenant to C., A. and B. should not occupy them, or interfere to prevent any arrangement which D. might be desirous of making for continuing his occupation of the premises under C.; that A. and B. were and continued ready and willing to suffer D. to continue such occupation under C., and did not interfere to prevent D. from entering into any arrangement with C. as therein mentioned; that A. and B. re-

ceived the keys of the chambers from D., and took possession thereof, to the intent that they might let them for the benefit of D.; and that they refused to receive the keys, except on the terms that D. should not be released from his liability in respect of the agreement in the first count mentioned,—*absque hoc*, that all the estate, &c., and tenancy of D. in the chambers, were duly surrendered by act and operation of law, in manner and form, &c.:—Held, *bad*, on special demurrer, on the ground that the inducement was inconsistent and incongruous with the traverse. *Smith v. Lovell*, 6

2. The seventh plea stated, that, before the rent became due from A. and B. to C., it had been agreed between A., for and on behalf of himself and B., and with his authority, and D., that D. should deliver up the possession of the chambers to A., and that, in consideration thereof, D. should be discharged from further liability for rent; and that D. did accordingly deliver up possession to A., which he on behalf of himself and B. accepted.

To that plea A. and B. replied, traversing that it was agreed by and between A., for and on behalf of himself and B., and D., that D. should be discharged from liability to pay any further rent, and that possession was accepted, in pursuance of the alleged agreement, in discharge of D.'s liability, in manner and form, &c.:—Held, that the traverse was too large. *Ib.*

3. *Quare*, whether the replication was not also *bad* for duplicity and multifariousness? *Ib.*
4. The eighth plea alleged, that, before the rent became due from A. and B. to C., A., with the sanction and authority of B., evicted D. Replication, traversing that A. evicted D., with the sanction and authority of B.:—Held, *bad*, the traverse being too large. *Ib.*
5. The eleventh plea, to the second and third counts (the former being for use and occupation, the latter upon an account stated), averred, that, after the accruing of the causes of action, and before action brought, D. was discharged under the insolvent debtors act. Replication, that the causes of action accrued after the order and adjudication in the plea mentioned:—Held, *bad*, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the accruing of the causes of action. *Ib.*

And see **BANKRUPT, III.**

VII. *Plea of Payment.*

A. and B. gave their joint and several promissory note to C., who afterwards, by arrangement with A., received in satisfaction of that note another of the like amount from D., which was ultimately paid by E.:—Held, that these facts sustained a plea of payment

by B., in an action against him by C. on the first note. *Thorne v. Smith*, 659

VIII. *Allowance of Cross Demands, and Payment of the Balance.*

To assumpsit on three bills of exchange, for 300*l.* 33*4**l.*, and 278*l.* respectively, with a count for goods sold and delivered, money paid, and interest, and a count upon an account stated, the defendant pleaded, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and the plaintiff accounted together of and concerning the said causes of action, and of and concerning certain other claims and demands of the plaintiff against the defendant, and certain other claims and demands of the defendant against the plaintiff, and that, on that accounting, 50*l.*, and no more, was found to be due from the defendant to the plaintiff, which sum the defendant, in consideration of the premises, promised the plaintiff to pay to him on request; and that, afterwards, and before the commencement of the suit, the defendant paid to the plaintiff, and the plaintiff accepted and received from the defendant, 50*l.*, in full satisfaction and discharge of such last-mentioned sum:—

Held, on special demurrer, that the plea amounted to an allegation of the allowance of cross-demands upon an account stated, and payment of the balance, and afforded substantially a good defence to the action: and that it was unexceptionable in point of form. *Oallander v. Howard*, 299

IX. *Merger of Simple Contract in Specialty.*

1. A bond of covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a merger of the remedy on the simple contract. *Price v. Moulton*, 561
2. To an *indebitatus* count for 6000*l.*, the defendant, as to 3000*l.*, parcel, &c., pleaded, that, after the accruing of the cause of action as to the 3000*l.*, parcel, &c., it was agreed that the defendant should execute an indenture whereby he should covenant with the plaintiffs to pay them 3000*l.* and interest on a certain day; that, in pursuance of that agreement, the defendant did, with the assent and consent, and at the request of the plaintiffs, execute and deliver to them such indenture as aforesaid; and that thereupon, and by force of the said indenture, the cause of action as to the 3000*l.*, parcel, &c., became merged and extinguished in law.

Replication, that the indenture was made by way of security, for securing the payment of the said debt of 3000*l.* in the plea mentioned, and that it always was and is in and by the said indenture expressed that the same was made as such security as aforesaid:—

Held, on demurrer, that the plea amounted to a plea of merger, and was a substantial answer to the count, though it contained no allegation that the indenture was accepted by the plaintiffs in satisfaction of the original debt; and that the replication afforded no answer to the plea. *Price v. Moulton*, 561

PRACTICE.

I. Judgment as in case of a Nonsuit.

1. *Cause made a Special Jury.*—A defendant under a peremptory undertaking to try at the first sitting in term, duly gave notice of trial, and passed the record, but, two days before the sitting day, obtained a rule for a special jury, in consequence of which the cause was passed over and made a remanet:—Held, that the plaintiff thereby broke his undertaking. *Levy v. Moylan*, 657
2. *Unreasonable Delay.*—Issue was joined in 1844: the court in 1851, discharged, with costs, a rule for judgment as in case of a nonsuit. *Dixon v. Roper*, 918

II. Commission to examine Witnesses Abroad. See EVIDENCE, III.

III. Entry of Verdict, where Debt paid after Action brought.

In debt, the particulars delivered were as follows:—"This action is brought to recover the sum of 1s. damages for the detention of the debt for which this action is brought, together with costs of suit; the debt of 86l. 9s. having been paid by the defendant to the plaintiff since the action was brought."

At the trial, the plaintiff proved a debt to the extent of 52l. 19s. only, and the verdict was entered for that sum and 1s. damages:—Held, that it was properly entered. *Nesbitt v. Page*, 643

And see DEMURRER-BOOKS.

PRISONER.

1. It is entirely in the discretion of a judge, to grant or to refuse a *habeas corpus*, to enable a prisoner to attend to show cause against a summons. *Ford v. Graham*, 369
 2. *Seem*, that a special ground should be laid for such an application. *Id.*
- And see INSOLVENT DEBTOR.

PRIVILEGED COMMUNICATION.

See SLANDER.

PROMOTIONS.

See MEMORANDA.

PROTEST.

Payment supra Protest—See BILL OF EXCHANGE, II.

PUBLIC COMPANY.

See JOINT-STOCK COMPANY.
RAILWAY COMPANY.

RAILWAY COMPANY.

I. Subscription Contract, Construction of.

An allottee of shares in a railway company provisionally registered,—the prospectus of which stated that its capital was to consist of 700,000l., in 35,000 shares of 20l. each,—paid a deposit of 2l. 2s. per share, and signed the subscription contract, which stated that a capital not exceeding 700,000l. should be raised, and gave the provisional directors authority to carry on the undertaking, and to apply to parliament for the necessary powers, and out of the moneys which should come to their hands by way of deposit or payment of calls or otherwise, to pay all costs, &c., and generally to apply such moneys towards the fulfilment of any engagements which they might enter into, and in or towards the soliciting, &c., a bill or bills in parliament, and in obtaining the necessary acts for furthering the scheme.

The total number of shares taken up by the allottees, and upon which the required deposit had been paid, was 18,969 only, representing a capital of 379,380l. This number not being sufficient to comply with the standing orders of parliament, the provisional directors, in order to make up the requisite amount, procured a number of persons (of whom the defendant was one) to execute the subscription-contract, purporting, contrary to the fact, to become subscribers for shares to the number of 5230, representing a capital of 104,600l., and to have paid the deposit thereon. Of this fact, the plaintiff was ignorant.

The directors, after incurring considerable expense, failed to comply with the standing orders of parliament, and consequently no bill was brought in, and the scheme was ultimately abandoned.

At the trial, the lord chief justice told the jury, that, the plaintiff having subscribed for shares, and executed a subscription-contract, in an association which was represented to have a capital of 700,000l., in 35,000 shares, upon which a deposit of 2l. 2s. each was to be paid, and 18,969 shares only having been *bond fide* taken up,—the project to which the plaintiff subscribed must be considered as determined, and consequently that the committee were not authorised to go to parliament at the plaintiff's expense; and that, under the circumstances, the execution of the subscription-contract by the plaintiff had no material effect upon the plaintiff's right to recover:—

Held, upon a bill of exceptions, that this direction was erroneous; for, that the sub-

scription-contract,—which must be read by itself, and without reference to the previous parol contract arising upon the letters of application and allotment,—authorized the directors to raise a capital not exceeding 700,000*l.*, but did not require them absolutely to raise that sum before they could take any steps to carry the undertaking into effect; and that, by executing the deed, the plaintiff authorized the directors to do all that was consistent with its provisions, and, amongst other things, to apply the deposits in furtherance of the scheme. *Watts v. Salter*, 477

II. Contract of Carriage.

Horses and Live Stock.—Horses were delivered to a railway company, to be carried by them from A. to B., for hire, subject to a note or ticket containing the following notice:—“This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriages, and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway, or in their vehicles.”—

Held, that, giving to the words of the contract their most limited meaning, they must apply to all risks, of whatever kind, and however arising, to be encountered in the course of the journey; and, therefore, that the company were not responsible for injury done to a horse from the firing of a wheel, in consequence of the neglect of the servants of the company to grease it. *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 454

III. Toll—See COUNTY COURT, III.

RATES.

See LEASE.

LITERARY SOCIETY.

RE-ENTRY.

See LEASE.

RESTRAINT OF TRADE.

See COVENANT, II.

RIGHT OF WAY.

What passes to an Assignee.

1. It is not competent to a vendor to create rights unconnected with the use or enjoyment

of the land, and to annex them to it: neither can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee. *Ackroyd v. Smith*, 164

2. In trespass *quare clausum fregit*, the defendants justified under a supposed right of way conveyed to them by A. The plea, after stating the conveyance to A. of “a certain close, and certain plots, pieces, or parcels of land, &c., together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing, for all purposes, in, over, along, and through a certain road, &c.,” alleged an assignment by A. to the defendants of “the said lands, tenements, hereditaments, premises, and appurtenances,” granted by the former deed; and then averred that the trespasses complained of were committed by the defendants, being owners of the said lands, &c., and in the possession and occupation thereof, in using the right of way for their own purposes. The plaintiffs, after setting out the deed upon oyer, demurred specially to the plea, on the grounds that the defendants claimed a more extensive right than that granted by the deed, and that, if the right as claimed was granted by the deed, it was not assignable:—

Held, that the grant to A. was not restricted to the use of the way for the purposes connected with the occupation of the land conveyed: but that the right in question was not one which inhered in the land, or which concerned the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by the assignment. *Id.*

SALE.

Of Goods.

1. *Construction of Contract.*—1. The declaration stated, that, in consideration that the plaintiff would employ the defendant as a coal-factor to sell certain coals on account of the plaintiff, the defendant promised the plaintiff that he would not sell the said coals otherwise than for ready money, and alleged for breach, that the defendant sold the coals otherwise than for ready money, to wit, at two months' credit:—

Held, that the action was not sustained by the production of the following letter of instructions given by the plaintiff to the defendant, and by proof of a sale of the coals at 1*5s.* 6*d.* per ton, at a credit of two months:—“Please sell for me 250 tons of anthracite coal, at such price as will realize me not less than 1*5s.* per ton, net cash, less your commission for such sale.” *Doden v. French*, 886

2. A contract for the sale of thirty bales of goats' wool at a certain price per lb., contained the following stipulation,—“Customary allowance for tare and draft, and to be paid for by cash in one month, less 5 per cent. discount.”—Held, that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month. *Spartali v. Benoecke*, 212
3. *Evidence to explain.*—Held, also, that, there being no ambiguity in the language of the contract, evidence was not admissible, to show, that, by the usage of the particular trade, vendors selling under such contracts, were not bound to deliver the goods without payment. *Id.*
4. *Warranted equal to Sample.*—Upon a sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them, on the ground that they do not correspond with the sample, unless there be an express condition to that effect; but must resort to a cross-action, or rely on the non-correspondence with sample as a ground for reduction of damages. *Dawson v. Collis*, 523

SCIENTIFIC SOCIETY.

See LITERARY SOCIETY.

SCIRE FACIAS.

- I. *To repeal Letters Patent*—*See* LETTERS PATENT, II.
- II. *For Execution against a Member of a Company*—*See* JOINT STOCK COMPANY.

SECRET TRUST.

See RESTOPPEL, III.
PARLIAMENT.

SEQUESTRATION

In this court, a writ of sequestration issues without motion. *Caudwell v. Colton*, 575

SET-OFF.

See AMENDMENT, 5.
COUNTY COURT, VI.

SHIPPING.

Authority of Master.

To sign Bills of Lading.—The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. *Grant v. Norway*, 665

SIMPLE CONTRACT DEBT.

Merger of—*See* PLEADING, IX.

SLANDER.

Privileged Communication.

1. In slander or libel, the term “privileged communication” comprehends all cases of communications made *bona fide*, in pursuance of a duty, or with a fair and reasonable purpose of protecting the interest of the party uttering the defamatory matter. *Somerville v. Hawkins*, 583
2. Therefore, where the defendant had dismissed the plaintiff from his service on suspicion of theft, and, upon the latter coming to his counting-house for his wages, called in two other of his servants, and, addressing them in the presence of the plaintiff, said,—“I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him:”—Held a privileged communication; for, that it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, inasmuch as such association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and to the defendant himself. *Id.*
3. To entitle the plaintiff in such a case to have the question of malice left to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given. *Id.*

SPECIAL JURY.

Certificate for, when made

A cause came on for trial before WILDE, C. J., on the 13th of December, 1848, when a verdict was taken for the plaintiff, subject to a special case. Upon the argument of the special case, on the 11th of June, 1850 (which was after WILDE had ceased to be a judge of this court), the court directed a nonsuit. On the 12th of September, the following endorsements were made upon the nisi prius record:—

“I certify that this was a fit and proper cause to be tried by a special jury.

“THOMAS WILDE.

“It was assented to at nisi prius, that, in the event of judgment being for the defendants, I should certify for the special jury; which, I have accordingly done *nunc pro tunc*.
“THURRO.”

The court refused to set aside the certificate as being informal or too late. *Serrell v.*

*The Derbyshire, Staffordshire, and Worcester
Junction Railway Company,* 910

SPECIAL TRAVERSE.

See PLEADING, VI. 1.

SPIRITUAL USES.

See CASE, 2.

SPECIALTY DEBT.

Merger—See PLEADING, IX.

STAMPS.

On Leases.

In debt for rent on an indenture, with a plea of *non est factum*, the plaintiff is entitled to recover on production of a deed bearing a counterpart stamp, and on proof of its execution by the defendant,—without going on to prove the execution of a lease by himself. *Hughes v. Clark,* 905

SUBPENA.

See EVIDENCE, II. 2.

SUGGESTION.

See COUNTY COURT, V. 1.

SURPRISE.

Affidavit of—See AMENDMENT, 2.

SURRENDER.

By operation of Law—See PLEADING, VI. 1.

TENDER.

See COUNTY COURT, V.

THEATRICAL AGREEMENT.

See CONTRACT, 1, 2.

TIME.

Allegation of—See PLEADING, V.

TOLL.

Title to—See COUNTY COURT, III.

TRAVERSE.

See PLEADING, VI.

TRUSTEES.

Payment of a bond debt to one of two trustees, is a good discharge as to both. *Husband v. Davis,* 645

VARIANCE.

See AMENDMENT.

VERDICT.

See COUNTY COURT, V. 4.

VIDELICET.

Allegation of Time, &c., under—See PLEADING, V.

VOTES.

Multiplying—See PARLIAMENT.

WAIVER.

See AMENDMENT, 2.

WARRANTER.

See CONTRACT, 4.

LANDLORD AND TENANT, I.

WAY.

See RIGHT OF WAY.

WRIT OF INQUIRY.

See COUNTY COURT, V. 2, 3.

Notes A., C., and D., are unavoidably postponed. They will appear at the end of the next volume.

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